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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

vs.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether traders of commodity futures contracts may invoke the powers of the federal district courts in order to enforce Sections 4a, 4b and 9(b) of the Commodity Exchange Act (the "CEA"), 7 U.S.C. §§6a, 6b and 13(b), against a futures commission merchant?

Related questions are presently before this Court:

Whether § 4b of the Commodity Exchange Act provides customers with a private right of action for damages against their brokers ("futures commission merchants") is the subject of the pending petition in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran,* No. 80-203.

Whether there is a private right of action for damages against a commodity exchange (a designated "contract market" for the trading of futures contracts) and its officials under § 5(d), §5a(8) or § 9(b) of the Commodity Exchange Act is the subject of the pending petition in *New York Mercantile Exchange, Richard B. Levine, Howard Gabler and Alfred Pennisi* v. *Neil Leist, Philip Smith and Incomco,* No. 80-757.

PARTIES BELOW

The parties to the three consolidated appeals below were:

No. 79-7402

Appellants: Neil Leist, Philip Smith and Incomco.

Appellees: Clayton Brokerage Co. of St. Louis, Inc.,* Heinold Commodities, Inc., Thompson & McKinnon, Auchincloss, Kohlmeyer, Inc., New York Mercantile Exchange, Richard B. Levine, Howard Gabler, Alfred Pennisi.

No. 79-7464

Appellant: Incomco.

Appellee: The New York Mercantile Exchange.

No. 79-7482

Appellant: National Super Spuds, Inc.

Appellees: Heinold Commodities, Inc. and Thompson & McKinnon, Auchincloss, Kohlmeyer, Inc.

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*Clayton Brokerage Co. of St. Louis, Inc. ("Clayton"), the Petitioner herein, is a corporation. One hundred percent of the issued and outstanding stock of Clayton is owned by Garnac Grain Co., Inc. ("Garnac"). Clayton has no subsidiaries or affiliated corporations except corporations wholly owned by Clayton or Garnac and ADNAC, Inc., a corporation owned 50% by Garnac.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The Opinion and Order of the District Court dismissing the claims of the Respondents herein against Petitioner and others insofar as the claims arose under provisions of the Commodity Exchange Act is published at 470 F. Supp. 1256 and is reprinted as Appendix B hereto, pp. A 168-185. The majority and dissenting Opinions of the Court of Appeals, reversing the judgment of the District Court are not yet officially reported, but are unofficially reported at [current binder] Comm. Fut. L. Rep. (CCH) ¶21,051, and are reprinted as Appendix A hereto, pp. A 1-167.

JURISDICTION

The judgment of the Court of Appeals is dated July 8, 1980 and was entered on that date. On July 22, 1980 Petitioner timely

filed a Petition For Rehearing And Suggestion Of Appropriateness Of A Rehearing En Banc which was denied by orders entered on September 9, 1980. This Petition is filed within 90 days of that denial.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The texts of Article I, Section 1 of the Constitution of the United States; the Commodity Exchange Act, 7 U.S.C. §§ 1-24, as amended, and Commodity Futures Trading Commission ("CFTC") Rule 150.10, 17 CFR § 150.10 are reprinted in Appendix F hereto, pp. A 192 - A 292.

STATEMENT OF THE CASE

This case arises out of commodity futures trading conducted on the New York Mercantile Exchange (the "Exchange") during the months of March, April and May, 1976 and involving contracts requiring the delivery of Maine grown potatoes during the month of May, 1976, (the "May Contract").

The Exchange is a board of trade, designated as a "contract market" by the CFTC pursuant to Section 5a of the CEA, 7 U.S.C. § 7a. The Exchange provides an organized, regulated marketplace in which contracts for the future delivery of certain specified commodities may be traded.

Petitioner, Clayton Brokerage Co. of St. Louis, Inc. ("Clayton") is a futures commission merchant (an "FCM"), registered as such with the CFTC pursuant to Section 4f of the CEA, 7 U.S.C. § 6f. Clayton, as an FCM, acts as a broker for persons desiring to trade commodity futures contracts, buying and selling futures contracts for the accounts of its customers on

the various contract markets of which it is a member, all pursuant to the instructions of its customers.[1]

The Respondents, at all relevant times, were professional participants in the futures markets. Neil Leist was a member of the Exchange, engaged in trading commodity futures for his own account. Incomco was a partnership, duly registered with the CFTC as an FCM. Philip Smith was the managing partner of Incomco.

During the course of trading in the May Contract, Respondents acquired substantial long positions in the May Contract, speculating that the price of the contract would rise, enabling them to liquidate their positions at a profit. Various other traders, principally John R. Simplot and Peter J. Taggares and/or companies controlled by them, (the "Short Traders"), acquired substantial short positions in the May Contract. The Short Traders acquired their positions in the May Contract in their accounts with various FCMs, including Clayton, Heinold Commodities, Inc. ("Heinold") and Thompson & McKinnon, Auchincloss, Kohlmeyer, Inc. ("TMAK").

As the trading in May Contracts came to its scheduled conclusion, Respondents liquidated their long positions in the May Contract by selling offsetting short positions in the May Contract. The Short Traders' positions were not liquidated before the conclusion of trading and, pursuant to the terms of the May Contract, delivery of 50,000 pounds of Maine potatoes was required to satisfy each unliquidated May Contract. The Short Traders failed to make the required delivery respecting their open positions, thereby causing a default.

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[1] More complete descriptions of the functions and operations of the commodity futures markets and the participants are set forth in the Opinion of the Majority in the Court of Appeals (A 6-12) and in the Opinion of the District Court (A 172-174).

In September, 1976, Respondents filed suit in the United States District Court for the Southern District of New York, naming as defendants the Short Traders and their FCMs, including Clayton, Heinold and TMAK, the Exchange and certain of its officers, and certain others, all of whom (with the exception of the Exchange and its officers) were alleged to have participated in a conspiracy to manipulate downward the price of the May Contract. The conspiracy allegedly violated the provisions of the Commodity Exchange Act, 7 U.S.C. §§ 1-13[2] and Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1-2, and damaged the Respondents in the amount of $1,300,000.00 by diminishing the sums received by them on liquidation of their positions in the May Contract. The jurisdiction of the District Court was premised solely upon 28 U.S.C. §§ 1331, 1337 and Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15.

Clayton, the Exchange, Heinold and TMAK moved for judgment on the pleadings or alternatively for summary judgment pursuant to Rules 12(c) and 56(b), Fed. R. Civ. P. In support of the motions, the movants pointed out that the CEA does not make any provision for private rights of action such as those asserted by Respondents. Instead, the reparations procedures prescribed by Section 14 of the CEA, 7 U.S.C. § 18, and arbitration made available pursuant to Section 5a(11) of the CEA, 7 U.S.C. § 7a(11), are the only private remedies available for

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[2]The complaint does not specify which sections of the CEA were allegedly violated. The Court of Appeals treated the case as one in which sections 4a (prohibiting excessive speculation in commodity futures), 4b (prohibiting generally cheating and defrauding of customers), 5(d) (requiring boards of trade to make provisions to prevent manipulation), 5a(8) (requiring boards of trade to enforce their rules) and 9(b) (making manipulation of commodity prices a felony) of the CEA were at issue.

violation of a provision of the CEA. The District Court granted the motions in part, dismissing those claims asserted against the movants which were based on provisions of the CEA. The District Court held that private rights of action against FCMs and boards of trade are not among the remedies available for alleged violations of the CEA.

Respondents appealed the Order of the District Court to the Court of Appeals for the Second Circuit.[1] On July 8, 1980, a majority of the panel of the Court of Appeals reversed the Order of the District Court and held that private rights of action are to be implied against FCMs from Sections 4a, 4b and 9(b) of the CEA and against boards of trade from Sections 5(d), 5a(8) and 9(b) of the CEA. Judge Mansfield dissented from the holding of the Majority. In a well reasoned opinion, he noted that the Majority's holding rested on a principle of statutory construction which was inapplicable and that it sanctioned the very type of judicial legislation which was rejected, in principle, by this Court in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979) and *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979).

Clayton, Heinold, TMAK and the Exchange each filed timely petitions for rehearing. On September 9, 1980, the Court of Appeals denied the petitions.

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[1]The Order of the District Court was entered in respect of claims asserted in several cases which were consolidated for pre-trial purposes. The plaintiffs in two other suits, *National Super Spuds, Inc., et al.* v. *New York Mercantile Exchange, et al.*, 76 Civ. 2375, 2554, 2571, 2594 (LFM) and *Incomco* v. *New York Mercantile Exchange, et al.*, 76 Civ. 2648 (LFM), also appealed from the District Court's Order. The three appeals were consolidated in the Court of Appeals. Clayton was a party only to the appeal in *Leist* v. *Simplot*, No. 79-7402.

By this Petition, Clayton seeks review of the judgment of the Court of Appeals reversing the Order of the District Court.[4]

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[4]Since the Court of Appeals' determination that private rights of action are available to remedy violations of Sections 5(d) and 5a(8) of the Commodity Exchange Act does not affect the claims asserted against Clayton, Clayton does not seek review of that determination. The New York Mercantile Exchange, however, has filed a Petition for Certiorari with this Court seeking review of that holding. *New York Mercantile Exchange* v. *Leist*, Docket No. 80-757. Additionally, we are informed by counsel for Heinold that Heinold and TMAK will file a joint Petition for Certiorari seeking review of the decision of the Court of Appeals.

REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

This Court should grant this Petition For A Writ of Certiorari because the federal question presented — whether the violation of Sections 4a, 4b and 9(b) of the Commodity Exchange Act gives rise to private rights of action against FCMs based on that statute — is of such national significance that it properly should be resolved by this Court at the present time and because the federal questions presented were decided in a manner which conflicts with this Court's decisions in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11; *Touche Ross & Co.* v. *Redington*, 442 U.S. 560; and *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979).

I. The Questions Of Federal Law Presented By This Case Are Of National Importance And Should Be Decided By This Court At This Time

It has been estimated that 58.5 million commodity futures contracts having an aggregate value in excess of 1.5 trillion dollars are traded annually on the nation's commodity enchanges.[5] Hundreds of thousands of persons have a direct interst in these transactions, either because the transactions are made for their account or because as market professionals they have a role in the process by which the transactions are effected.[6] The resolution of the questions presented for review is of extraordinary practical significance to all of these persons because it will determine whether the federal district courts are to serve as a forum in which private complaints arising out of transactions in the commodity futures markets may be heard.

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[5] Wall St. J., Jan. 9, 1979, at 30, col. 1 (Midwest Ed.) (estimate for 1978).

[6] Remarks of Philip F. Johnson, Chairman, ABA Committee on Commodities Regulation, 35 Bus. Law. 691 (Special Issue) (March, 1980); Remarks of Hon. James M. Stone, Chairman, Commodity Futures Trading Commission, *Id.* at 692.

The legal ramifications of this case will extend well beyond the commodity futures industry. The determination of the proper basis for judicial recognition of private rights of action based on federal statutes which do not in express terms create such rights will have an impact on each industry which Congress has chosen to regulate.

As the decisions cited below indicate, the lower federal courts are in a quandary over how to resolve the vexing question presented for review. The guidance of this Court is necessary to resolve conclusively, for the benefit of all the participants in the commodity futures markets, where and how they may call or be called to account for activities involving the commodity futures markets, and to delineate more clearly the respective roles of the judicial and legislative branches of the federal government in creating federal private rights of action.

A. This Court Should Exercise Its Jurisdiction In This Case To Assure That Private Rights Of Action Based Upon The Commodity Exchange Act Are Not Created By Judicial Legislation

The decision in this case is one of two recently rendered by United States Courts of Appeals addressing the issue whether private rights of action are available to remedy violations of certain provisions of the CEA.[7] Both the Majority in the Second Circuit and the Majority in the Sixth Circuit which decided the case of *Curran* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216 (6th Cir. 1980) held that private rights of action are available to remedy violations of certain provisions of the CEA. The *Curran* court aptly described its decision (and, unknowingly, the subsequent decision in this case) in the following manner:

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[7] In addition to the Second Circuit's decision in this case, the Sixth Circuit has determined that a private right of action is to be implied from the provisions of Section 4b of the CEA, 7 U.S.C. §6b, on

> What we have done here, in our view, is to preserve the general concept of a private right of action and to provide for its continuing development . . . . This approach . . . allows for the development of a private right of action similar to the valuable body of law that has grown under Section 10 of the Securities Exchange Act and Rule 10b-5. *Id.* at 236.

When this Court recognized an implied private right of action based upon violations of Section 10b of the Securities Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, the Court "simply explicitly acquiesced in the 25-year-old acceptance by the lower federal courts . . . ." *Touche Ross & Co.* v. *Redington,* 442 U.S. at 577, n.19. The Court made no determination whether Congress had intended to create private rights of action based on violations of Section 10b. Thus, for purely historical reasons this Court did not consider the propriety of recognizing private rights of action based on Section 10b and Rule 10b-5 under the standards which this Court has indicated are dispositive of such issues. *Cannon* v. *University of Chicago,* 441 U.S. at 690-93, n.13. The result, as this Court described it in *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723 (1975), is that "private actions under Rule 10b-5 . . . [constitute] a judicial oak which has grown from little more than a legislative acorn." *Id.* at 737.

At the present time, there is no similar history of long-standing, uniform lower court interpretations of Sections 4a, 4b and 9(b) of the CEA. The district courts are in sharp disagreement over whether those sections of the CEA should be construed to create private rights of action. (A 5, 43-44 n.19). Unless this Court exercises its jurisdiction in this case, however,

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behalf of a customer who sues his commodity futures broker. *Curran* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 622 F.2d 216 (6th Cir. 1980). The defendant in that case has filed a Petition For Certiorari. *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran,* Docket No. 80-203.

such a history may develop, based largely on the precedent of the decisions of the Second Circuit in this case and the Sixth Circuit in *Curran*. As the discussion *infra*, at pp. 18-23, demonstrates, these two decisions were reached in a manner which clearly conflicts with the controlling decisions of this Court. This Court should exercise its jurisdiction over this case to foreclose any possibility that private rights of action based on provisions of the CEA will be created by judicial rather than congressional legislation.

B. There Is Substantial And Recurrent Disagreement Among The Federal Judiciary Concerning Whether Private Civil Actions For Damages Are Among The Remedies Available For Violation Of Sections 4a, 4b and 9(b) Of The Commodity Exchange Act

Since 1974, no fewer than twenty-seven reported decisions of the lower federal courts have considered whether a private right of action is available to redress alleged violations of one or another of the Sections of the CEA.[9] These decisions generally recognized that "congressional intent" is a touchstone for determining whether a private right of action is implicitly created by a federal statute. Neither the judges of the two courts of appeals which have considered the question presented for review nor the federal district judges are in agreement, however, on the nature of the congressional intent which must be evident in order to imply a private right of action from a provision of the CEA. These judges also disagree on whether there exists, assuming a particular standard is to be followed, the requisite congressional intent to create a private right of action for violation of particular provisions of the CEA.

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[9] A 43-44, n.19. Most of these cases have involved allegations of fraud on the part of an FCM and were brought by customers of the FCM who seek to recover damages on the basis of Section 4b of the CEA. Several, however, have involved claims based on Section 4a and/or Section 9(b).

The Opinions filed in the Court of Appeals in this case illustrate these disagreements. As one court described them: "Writing for the majority, Judge Friendly wrote a scholarly eighty-six page opinion, concluding that a private right of action for damages did exist. Proceeding from the same authorities, however, Judge Mansfield wrote an equally learned opinion, this one seventy-six pages in length, arriving at the directly opposite conclusion." *Deneau* v. *Amtel, Inc.* [current] Fed. Sec. L. Rep. (CCH) ¶97,645 at p. 98,459 (S.D.N.Y. 1980).

Judge Friendly viewed the determinative question before the court to be whether Congress had demonstrated an intention, when it amended the CEA in 1974, to "alter the significance" that the courts had previously assigned to Sections 4a, 4b, 5(d), 5a(8) and 9(b) of the CEA. (A 45). He determined, based upon the legislative history of the amendments, that Congress had not so intended. He thus concluded that private rights of action should be recognized as an available remedy for violation of those Sections of the CEA. (A 88-89).

Judge Mansfield viewed the determinative question before the court to be whether Congress had ever indicated its intention to create private rights of action for violation of any of Sections 4a, 4b, 5(d), 5a(8) or 9(b) of the CEA. (A 95). He determined that Congress had not demonstrated such an intention, either when the provisions in question were first enacted or when the CEA was amended. On that basis Judge Mansfield reasoned that private rights of action are not among the remedies available for violations of the CEA. (A 91, 108-126). Moreover, Judge Mansfield found no persuasive evidence, either in the legislative history of the amendments or in the amendments themselves, of any congressional intent to approve of the court decisions implying a private right of action from the CEA. (A 141-160). He concluded that since such approval was a necessary predicate to employing the form of analysis which Judge Friendly used, Judge Friendly's form of analysis was improper. (A 161-167).

These same disagreements surfaced in the majority and dissenting opinions in *Curran* v. *Merrill Lynch, Pierce, Fenner & Smith, supra.* Comparison of the numerous district court opinions discussing private rights of action based on provisions of the CEA reveals the same disagreements among the federal district judges. *Compare, e.g., Fischer* v. *Rosenthal & Co.*, 481 F.Supp. 53 (N.D.Tex. 1979)(no private right of action; expressly specified remedies must be viewed as exclusive, particularly in light of congressional refusal to adopt amendments expressly creating private rights of action when amending CEA) *with Poplar Grove Planting and Refining Co.* v. *Bache Halsey Stuart Inc.*, 465 F. Supp. 585 (N.D.La. 1979) (private right of action implied; legislative history of 1974 amendments to CEA reveals congressional intent to create such rights for protection of traders); and *Gonzalez* v. *Paine, Webber, Jackson & Curtis, Inc.*, 493 F.Supp. 499 (1980) (no private right of action; 1974 amendments demonstrate intent that private rights of action based on CEA should no longer be available) *with Alken* v. *Lerner*, 485 F. Supp. 871 (D.N.J. 1980) (private right of action implied; no evidence of congressional intent to legislatively overrule prior court decisions).

The already decided and reported cases in which the existence of private rights of action based on sections of the CEA has been litigated represent but a small portion of the cases in which the issue is being presented for decision by the lower federal courts. Clayton is a party to several pending cases in which motions to dismiss grounded on the nonexistence of private rights of action under Section 4b of the CEA are now pending.[*] Clayton's situation in this regard is by no means unique among

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[*] *See, e.g., Milton Friend, et al.* v. *Clayton Brokerage Co. of St. Louis, Inc., et al.*, CA3-79-0182R (N.D.Tex.); *Horace G. Woodburn* v. *Clayton Brokerage Co. of St. Louis, Inc., et al.*, CA3-80-0669-D (N.D.Tex.); *William F. Minor, et al.* v. *Clayton Brokerage Co. of St. Louis, Inc.*, 80-6175-Civ NCR (S.D.Fla.) *William Belliveau, et al.* v. *Clayton Brokerage Co. of St. Louis, Inc.*, CA No. 80-1642 (D.N.J.).

the 329 brokerage firms[10] now engaged in the commodity futures industry.[11] Given the proliferation of litigation in which the existence of a private right of action to enforce provisions of the CEA is being challenged and the division of existing authorities which have considered the issue, substantial amounts of the scarce judicial resources of the lower federal courts will undoubtedly continue to be expended in an effort to resolve the issues presented by the case. There appears to be little likelihood that a soundly reasoned consensus of authority will develop as a consequence of those efforts. This unconstructive expenditure of judicial energies can be avoided if this Court issues the writ of certiorari in this case and resolves, once and for all, whether a private right of action is available against FCMs to remedy violations of Sections 4a, 4b, or 9(b) of the CEA.

C. There Is Continued Uncertainty Concerning The Basis For Implying Private Rights Of Action From Federal Statutes Which Do Not, In Express Terms, Create Such Rights.

The disagreement within the federal judiciary concerning whether private rights of action are available to remedy violations of the CEA is merely symptomatic of the continued uncertainty regarding a much broader federal question: what is the proper basis for implying a private right of action from a federal statute which does not, in express terms, create such a right.

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[10] Remarks of Philip F. Johnson, Chairman, ABA Committee on Commodities Regulation, 35 Bus. Law. 691 (Special Issue) (March, 1980).

[11] *See, e.g.*, Petition for Writ of Certiorari, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, Docket No. 80-203 at p. 15, listing 5 pending cases to which Merrill Lynch is a party in which the same issues are being litigated.

This Court's recent decisions involving the implication of a private right of action from a federal statute clearly indicate that a restrictive approach is required when a court attempts to determine whether to imply a private right of action. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 19-20, 23; *Touche Ross & Co.* v. *Redington*, 442 U.S. at 578; *Cannon* v. *University of Chicago*, 441 U.S. at 718 (Rehnquist, J., concurring); *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979). These decisions, however, have cast the issue of whether private rights of action are available based upon the statutes relied on by the plaintiffs as problems in statutory construction. This has been taken by some courts as an invitation to invoke any of the panoply of "rules" of statutory construction which will permit the court to justify finding the existence of the asserted private right of action and even to expand the scope of the "rules" when necessary. The Majority below accepted this perceived invitation. Its opinion exemplifies the art of statutory construction which has come into vogue among federal courts determined to take an expansive approach to implying private rights of action from federal statutes.

The Majority perceived the array of remedies expressly prescribed by the CEA—fines (7 U.S.C. § 13), injunctions (7 U.S.C. § 13a-1), imprisonment (7 U.S.C. §13), administrative sanctions (7 U.S.C. §§ 8, 9), damage awards in reparations (7 U.S.C. § 18)—as inadequate, in part because, in the Majority's view, persons claiming injury as a consequence of violations of the CEA could not, in all cases, proceed directly against all persons responsible for the allegedly injurious conduct. (A 66-67). The fact that the Majority even engaged in this analysis demonstrates that the Majority's notions of appropriate policy were being substituted for analysis of the intent of Congress. "[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Touche Ross & Co.* v. *Redington*, 442 U.S. at 568, quoting *Cannon* v. *University of Chicago*, 441 U.S. at 688. The Majority decided that private

rights of action were appropriate in this case since that form of remedy would adequately protect injured parties and was consistent with the remedies made available under the federal securities laws, which the majority viewed as parallel statutes. (A 67, 75, 78). They applied the "rule" of statutory construction which states that the reenactment of the statute incorporates existing constructions of the statute. (A 45-46). This "rule" enabled them to "construe" the CEA to provide private rights of action against FCMs for violations of Sections 4a, 4b, and 9(b) of the CEA.

The provisions of the CEA have never been reenacted. The CEA was, however, amended on several occasions. The most significant amendment occurred with the enactment of the Commodity Futures Trading Commission Act of 1974, Pub. L. 93-463, 88 Stat. 1389 (1974) (the "CFTC Act"). The CFTC Act did not alter the language of Sections 4a, 4b and 9(b) of the CEA relied on by the Majority, although these provisions were amended in respects not relevant to this case.[12]

The provisions of the CEA had never been construed, prior to 1974, as creating private rights of action for violation of Sections 4a, 4b or 9(b). In 1967, the court in *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440 (N.D. Ill. 1967) relied on general principles of tort law (the same principles which this Court held inapplicable to the construction of federal statutes in *Touche Ross & Co.* v. *Redington*, 422 U.S. at 568) to support its determination that "[v]iolation of the standard of conduct set out in Section 6b of the Commodity Exchange Act [referring to Section

---

[12]Section 4a was revised by deleting the statutory definition of "hedging" and authorizing the Commodity Futures Trading Commission to define the term. Section 4b was amended by deleting a reference to "cotton" and substituting the term "a commodity" in a subpart of the provision which is unrelated to the transactions at issue in this case. Section 9(b) was amended to increase the fines for felonious manipulation from $10,000 to $100,000.

4b of the CEA, 7 U.S.C. § 6b] is a tort for which plaintiffs . . . have a federal civil remedy even in the absence of specific mention of a civil remedy in the Commodity Exchange Act." *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. at 447. The Court in *Goodman* never exhibited any effort to construe the provisions of the CEA alleged to have been violated. If the *Goodman* court can be said to have construed anything at all, it would be the general principles of tort law which it "construed" to be applicable to cases involving federal statutes. During the succeeding seven years, a number of other cases reached substantially the same result. Those cases were all based either upon unquestioned reliance on *Goodman* or on other cases which themselves placed unquestioned reliance on *Goodman*.

Thus, when Congress amended the CEA in 1974, there was no existing construction of any provision of the CEA which held that any section of the CEA created a private right of action.

The Majority nevertheless invoked the "rule" referred to above. On the basis of the "rule" and scattered fragments of legislative history, consisting largely of statements of partisan witnesses and individual members of Congress who sought, unsuccessfully, to secure the passage of proposed provisions of the CFTC Act which would have created private rights of action for violation of any provision of the CEA, the Majority held that such rights of action had been "implicitly approved by Congress." (A 46).

Many courts have "construed" other federal statutes as implicitly creating private rights of action under circumstances in which the Court's notion of appropriate policy seemed to dictate that a private right of action should be available.[11] Other

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[11] *See, e.g., National Sea Clammers Ass'n* v. *City of New York*, 616 F.2d 1222 (3rd Cir. 1980) (implying private right of action from Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376, despite existence of other express remedies under the statute for the alleged conduct); *Chumney* v. *Nixon*, 615 F.2d 389 (6th Cir. 1980) (implying

courts have adopted a more constrained approach to this type of issue. These courts have declined to recognize private rights of action to enforce federal statutes in the absence of clear indicia that Congress intended to make such rights of action available.[14] This dichotomy in approaches to the problem of implied private rights of action indicates the confusion which persists over when and why a private right of action based on a federal statute should be recognized by the courts. This Court's resolution of the issues presented in this case can only serve to clarify the applicable standards, reducing, if not eliminating, the uncertainty which now prevails.

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private right of action from criminal statute prohibiting assualt and battery while aboard commercial aircraft, 18 U.S.C. § 113(d)); *Bratton* v. *Shiffrin*, 15 Av.Cas. 18,076 (7th Cir. March 10, 1980) (finding that charter air travelers have an implied right to sue under Section 401(n)(2) of the Federal Aviation Act, 49 U.S.C. §1371(n)(2), for violations of Civil Aeronautics Board regulations governing charter arrangements, despite recognizing that the statute by its terms grants no private rights to any identifiable class and proscribes no conduct as unlawful); *Vega* v. *First Federal Savings & Loan Ass'n of Detroit*, 622 F.2d 918 (6th Cir. 1980) (finding, without explanation, an implied private right of action for violation of the Real Estate Settlement Practices Act, 12 U.S.C. §§2601 et seq.); *NAACP* v. *Medical Center, Inc.*, 599 F.2d 1247 (3rd Cir. 1979) (finding an implied private right of action to enforce Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794); *Sierra Club* v. *Andrus*, 610 F.2d 581 (9th Cir. 1979) (finding an implied private right of action to enforce Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §403); *see also* cases cited at Cannon v. *University of Chicago*, 441 U.S. at 741-742.

[14]*See, e.g., Taylor* v. *Brighton Corp.*, 616 F.2d 256 (6th Cir. 1980) (holding no private right of action under OSHA, 29 U.S.C. §§651-678); *United States* v. *Capelitti Brothers, Inc.*, 621 F.2d 1309 (5th Cir. 1980) (holding no private right of action for violations of Section 1 of the Davis-Bacon Act, 40 U.S.C. §276a); *Rogers* v. *Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980) (holding no private right of action to enforce Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. §793).

II. The Court Of Appeals' Decision To Recognize Private Rights Of Action For Violations Of The Commodity Exchange Act Conflicts With The Applicable Decisions Of This Court

A. The Majority's Refusal To Examine The Congressional Intent To Create The Private Rights Of Action Asserted By Respondents Cannot Be Reconciled With This Court's Decision In *Touche Ross*

In *Touche Ross, supra,* this Court explicitly held that the task of a court determining whether a private right of action is available based on a federal statute which does not, in express terms, create such a right of action

> is limited *solely* to determining whether Congress intended to create the private right of action asserted....*Id.* at 568. (emphasis added)

The Majority expressly declined to determine whether Congress intended to create the private rights of action asserted by Respondents. (A 45-46). Instead, the Majority invoked the "rule" of statutory construction which gives rise to the presumption that Congress is aware of existing "interpretations" of law. Relying on this presumption, the Majority reasoned that Congress would have clearly expressed itself had it desired to change the status quo. Based on this theory, the Majority inquired only whether the CFTC Act or its legislative history contained indicia of a contrary Congressional intent sufficient to rebut the Majority's presumption that congressional silence indicated congressional approval of the status quo. (A 46).

This device enabled the Majority to avoid the meticulous section by section analysis of statutorily created rights and duties which this Court has described as "the most accurate indicator of the propriety of implication of a cause of action." *Cannon* v. *University of Chicago,* 441 U.S. at 690, n.13. The plain language of Sections 4a and 9(b) of the CEA indicates that these provisions were not enacted for the benefit of speculators, such

as Respondents, but for the protection of the public at large against the impact of speculators' activities, *Liang* v. *Hunt*, 477 F.Supp. 891 (N.D.Ill. 1979). As the Majority conceded, the express terms of Section 4b of the CEA cannot be read as creating rights in favor of persons other than customers against persons other than their brokers. (a 91). Sixty-four years ago this Court recognized that if a private right of action is to be implied under a statute, it should be implied only in favor of those for whose especial benefit that statute was enacted and against those upon whom a duty is imposed by the statute. *Texas & P. Ry. Co.* v. *Rigsby*, 241 U.S. 33 (1916). The Statutes at issue here did not create rights in favor of Respondents or impose duties upon Clayton for Respondents' benefit. Thus, the right-duty analysis demonstrates that no private right of action can properly be implied in favor of Respondents against Clayton in this case.[11]

B. The Majority's Failure To Treat Congress' Designation Of Remedies For Violations Of The CEA As Exclusive Is In Derogation Of The Principles Enunciated In *Transamerica*

Other aspects of the analysis dictated by this Court's decisions compel the same conclusion. In order for the Majority to recognize private rights of action in favor of Respondents, it had to also ignore this Court's admonition, set forth in *Transamerica, supra,*

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[11]A determination that no private right of action is available in this case on the basis of Section 4b of the Commodity Exchange Act will not necessarily be dispositive of the question for cases, such as *Curran* v. *Merrill Lynch, Pierce Fenner & Smith, Inc., supra,* in which a customer alleges fraud by his FCM. Either the refusal of this Court to hear this case, leaving the decision of the Court of Appeals to stand as valid precedent, or a decision by this Court that Section 4b will support a private cause of action against Clayton in this case will necessarily be viewed as an indication that private rights of action are available under Section 4b for all disputes which routinely arise between brokers and their customers.

> that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. 444 U.S. at 19.

Section 14 of the CEA expressly provides that "*Any* person complaining of *any* violation of [the CEA] or any rule, regulation or order thereunder by any person who is registered . . . ." (emphasis added) with the CFTC pursuant to the terms of the CEA may file a complaint with the CFTC. The CFTC, after a proceeding to determine the merits of the complaint, may award the complainant the damages sustained by him. The reparations procedure (which was created by the CFTC Act) provides persons allegedly injured by violations of the CEA committed by persons who are registered or required to be registered with the CFTC with an opportunity for full and complete relief.[16] Had Congress, which gave no indication prior to 1974 of any intention to create private remedies (in any form) for violation of the CEA,[17] intended that private remedies in addition to those expressly provided for in the CFTC Act should be available, it cer-

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[16] As a practical matter, reparations will be available almost every time the CEA is violated and some person harmed. The registration provisions of the CEA are so broad that it will be a rare instance in which a transaction in commodity futures can be effectuated without the participation of persons who are registered or required to be registered under the CEA. Section 13 of the CEA, 7 U.S.C. § 13c, subjects any person who aids and abets a violation of the CEA to liability as a principal in administrative proceedings, such as reparations, under the CEA. In those rare instances in which there is no basis for invoking the reparations procedures the CEA expressly enables the individual states to recover damages on behalf of their citizens for violations of the CEA. 7 U.S.C. § 13a-2. The Majority's concerns, therefore, that persons aggrieved by violations of the CEA will be without a remedy and that persons such as the Short Traders in this case may escape from civil liability to the injured parties, are unfounded.

[17] Prior to 1974, parties injured by violations of the Commodity Exchange Act were expressly directed to their remedies under state law. From 1936 until 1974, Section 4c of the Commodity Exchange Act, 7 U.S.C. § 6c, provided that the provisions of Sections 4b and 4c

tainly knew how to provide for those additional remedies. Presumably, it would have done so expressly when it enacted the CFTC Act. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 21.

C. The Decision Below Results In An Unconstitutional Usurpation of Legislative Power By The Court

In light of Congress' deliberate creation of a specific form of private remedy for precisely the same conduct complained of by Respondents in this case, Congress' failure to provide expressly for the private rights of action asserted by Respondents can only be viewed as meaning that Congress did not intend the rights of action to exist. *Touche Ross & Co.* v. *Redington*, 422 U.S. at 573-74. Consequently, the decision to recognize the rights of action asserted by Respondents necessarily required the superimposition of the Majority's notions of appropriate remedies over those of Congress. This Court has long recognized that the doctrine of separation of powers prohibits courts from engaging in such usurpations of legislative prerogatives. *See, e.g., T.V.A.* v. *Hill*, 437 U.S. 153, 194, 196 (1978); *Scripps-Howard Radio* v. *F.C.C.*, 316 U.S. 4, 11 (1942); *see also Marbury* v. *Madison*, 1 Cranch 137, 177 (1803).

Article I, Section 1 of the Constitution of the United States clearly and unambiguously vests all of the legislative powers of the federal government with the Congress. Unquestionably the creation of private rights by the enactment of federal statutes is a legislative task, to be carried out in light of the political pressures and policy considerations which must be taken into

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of the Commodity Exchange Act, 7 U.S.C. §§ 6b, 6c, should not "be construed to impair any State law applicable to any transaction enumerated or described in such sections." 7 U.S.C. § 6c (1970). Thus, prior to 1974, injured persons may have had a remedy for actions which constituted violations of the Commodity Exchange Act; the available remedies, however, were prescribed by state, rather than federal law. The quoted language of Section 4c was repealed by the CFTC Act. This clearly indicates Congress' intent that injured parties should be limited to the expressly provided federal remedies.

account by legislators who are answerable to their constituents at each election. *Cannon* v. *University of Chicago*, 441 U.S. at 742-45 (Powell, J., dissenting); *see also Touche Ross & Co.* v. *Redington*, 442 U.S. at 568-571; *Cannon* v. *University of Chicago*, 441 U.S. at 717-18 (Rehnquist, J., concurring); *Chrysler Corp.* v. *Brown*, 441 U.S. at 317. The CEA as it exists today gives clear evidence of a careful balancing of the respective interests and concerns of various opposing groups, arrived at as a result of the legislative process.[18] When the judiciary, which is intentionally insulated from political pressure, attempts to substitute its notions of the appropriate fashion in which to resolve disputes between parties for those of Congress by recognizing private rights of action which Congress omitted from a particular regulatory scheme, there is a substantial risk that it will "frustrate those alternative processes that exist to resolve such disputes and . . . may dramatically revise the balance of interests struck by the legislation." *Cannon* v. *Univeristy of Chicago*, 441 U.S. at 748, n.19 (Powell, J., dissenting) *citing Santa Fe Industries* v. *Green*, 430 U.S. 462, 478-79 (1977); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. at 739-44.[19]

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[18] *See*, for example, the discussion in the Majority's opinion describing the evolution of §5a(11)(ii) of the Act, 7 U.S.C. §7a(11)(ii). (A 61).

[19] This suit, along with several others, has caused precisely this kind of disruption. The Exchange has conducted proceedings to investigate the acts and events at issue, to compensate those damaged as a result of the acts and events, and to penalize those responsible, as mandated by the Rules of the Exchange. The CFTC also conducted an investigation and initiated administrative proceedings against certain of the persons who are defendants in the case below (but not against Clayton). No reparations proceedings have been instituted against Clayton on the basis of the acts and events complained of by Respondents. Instead, Clayton, Heinold and TMAK have been forced to expend their resources defending themselves in both federal and state courts against numerous suits arising out of the events described above, forcing numerous courts to devote scarce time and resources to unravelling issues which Congress contemplated would be handled by the CFTC.

This Court's decisions plainly dictate that the courts should not recognize a private right of action to enforce a federal statute unless it clearly appears that Congress intended to create such a right of action. The Majority in the Court of Appeals did not discern such an intent, and, indeed, none can be discerned from any available evidence. The decision in the Court of Appeals, therefore, conflicts with the controlling decisions of this Court. It should be reversed to ensure a proper result in this case and the many pending cases in which private rights of action based on Section 4a, 4b or 9(b) of the CEA are at issue.

CONCLUSION

For all the reasons set forth above, Petitioner Clayton Brokerage Co. of St. Louis, Inc. respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Nos. 80-895 and 80-936

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.,

Petitioners,

v.

NEIL LEIST, PHILIP SMITH AND INCOMCO,

Respondents.

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.,

Petitioners,

v.

NATIONAL SUPER SPUDS, INC., *et al.*,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OCTOBER TERM, 1980

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.,

Petitioners,

v.

NEIL LEIST, PHILIP SMITH AND INCOMCO,

Respondents.

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.,

Petitioners,

v.

NATIONAL SUPER SPUDS, INC., *et al.*,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Clayton Brokerage Co. of St. Louis, Inc., Heinold Commodities, Inc. and Thomson & McKinnon Auchincloss Kohlmeyer Inc. have filed Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit.* These petitions present the question whether there is an implied private cause of action for damages against commodity brokers for the alleged violation of various provisions of the Commodity Exchange Act, 7 U.S.C. §§1-24, (the "Act") including Section 4b of the Act.

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*The listing, as required by Rule 28.1 of the Rules of the Supreme Court of the United States, of parent and subsidiary corporations and affiliates of Clayton Brokerage Co. of St. Louis, Inc. appears in its Petition for a Writ of Certiorari. For Heinold Commodities, Inc. and Thomson & McKinnon Auchincloss Kohlmeyer, Inc., this listing is attached to their Joint Petition for a Writ of Certiorari.

These petitioners submit this supplemental brief in support of their petitions in order to call the Court's attention to the recent decision of the United States Court of Appeals for the Fifth Circuit in *Rivers* v. *Rosenthal & Company*, No. 79-1313, December 16, 1980. (The opinion in *Rivers* is reprinted in the Joint Appendix to Supplemental Briefs in Support of Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit ("Joint Appendix") filed on behalf of all petitioners in Nos. 80-757, 80-895 and 80-936). This decision holds, contrary to the decisions of the United States Courts of Appeals for the Second Circuit and the Sixth Circuit in *Leist* v. *Simplot*, 2 Comm. Fut. L. Rep. (CCH) ¶21,051 (2d Cir. 1980) and *Curran* v. *Merrill Lynch Pierce Fenner & Smith, Inc.*, 622 F.2d 216 (6th Cir. 1980), that no implied private cause of action for damages exists in favor of a customer against his commodity broker for the alleged violation of Section 4b of the Act (7 U.S.C. §6b) and another section of the Act. In reaching its decision, the Fifth Circuit recognized that "[w]ithin the past half year the Second and Sixth Circuits have ruled that an implied private right of action does exist under the CEA," but stated that "both decisions were rendered by split panels over very forceful dissents." (Joint Appendix at 4a). The decision of the United States Court of Appeals for the Fifth Circuit unanimously rejected the holdings of the divided United States Courts of Appeals for the Second and Sixth Circuits and stands in irreconcilable conflict with those decisions. For this additional reason, together with the reasons heretofore presented, the Petitions for Writs of Certiorari

to the United States Court of Appeals for the Second Circuit filed by these petitioners should be granted.

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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

vs.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A

OPINION OF THE U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 402, 403, 404—September Term, 1979

(Argued January 16, 1980 Decided July 8, 1980)

Docket Nos. 79-7402, 79-7464, 79-7482

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs-Appellants,

—v.—

JOHN RICHARD SIMPLOT, J.R. SIMPLOT & CO., SIMPLOT PRODUCTS CO., INC., SIMPLOT INDUSTRIES, INC., SIMTAG FARMS, INC., PETER J. TAGGARES, P. J. TAGGARES & CO., HENRY A. POLLACK, HARVEY B. POLLACK, HARVEY B. POLLACK COMPANY, GERALD RAFFERTY, PRESSNER TRADING CORP., BENJAMIN PRESSNER, STEPHEN SUNDHEIMER, JULES NORDLIGHT, EDELSTEIN & CO., INC., CHARLES EDELSTEIN, ROBERT EDELSTEIN, MURIAL EDELSTEIN, MEIERFELD & COMPANY, INC., GILBERT MEIERFELD, DAVID MEIERFELD, ROBERT REARDON, F.J. REARDON, INC., HAROLD COLLINS, CASPAR MAYERSON, LYNNEWOOD EXPORTING COMPANY, ALEX SINCLAIR, MANNING STOLLER, HORNBLOWER & WEEKS-HEMPHILL, NOYES INC., MFX COMMODITIES, INC., DONALD SILVER, DUANE SOUTH, KENNETH RAMM, A & B FARMING INC., HUGH GLENN, GEARHEART FARMING, INC., EDWARD MCKAY, "JOHN" HUMPHREYS, FRANK FULLMER,

Defendants,

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMPSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER, ALFRED PENNISI,

Defendants-Appellees.

INCOMCO,

Plaintiff-Appellant,

—v.—

WAYNE COUNTY PRODUCE CO., and HAROLD COLLINS,

Defendants,

NEW YORK MERCANTILE EXCHANGE,

Defendant-Appellee.

NATIONAL SUPER SPUDS, INC., WILLIAM R. BUSTER, JR., WILLARD C. CHINER, EUGENE P. WEISMEN, RICHARD WELTS, RAYMOND ROTHBERG, ARTHUR S. ARMSTRONG, THEODORE BRINEK, CAPGAIN HOLDINGS, INC., and HEIZ ROMMINGER, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellants,

—v.—

NEW YORK MERCANTILE EXCHANGE, CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., PRESSNER TRADING CORP.,

JACK RICHARD SIMPLOT, J.R. SIMPLOT CO., SIMPLOT INDUSTRIES, INC., PETER J. TAGGARES, P.J. TAGGARES CO., C.L. OTTER, SIMTAG FARMS, KENNETH RAMM, A & B FARMS, INC., HUGH V. GLENN, GEARHEART FARMING, INC. and ED MCKAY,

Defendants,

HEINOLD COMMODITIES, INC., THOMPSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC.,

Defendants-Appellees.

Before:

FRIENDLY, MANSFIELD and KEARSE,
Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge*, 470 F.Supp. 1256 (1979), granting partial summary judgment to the New York Mercantile Exchange and three futures commission merchants, defendants in three consolidated actions wherein plaintiffs claimed damages arising out of the default by sellers of the May 1976 Maine potato futures contracts, on the ground that there is no private cause of action for damages under the Commodity Exchange Act, 7 U.S.C. §§ 1-19.

Reversed.

LEONARD TOBOROFF, Esq., New York, N.Y. (Robson & Toboroff, New York, N.Y.), *for Plaintiffs-Appellants Neil Leist, Philip Smith and Incomco.*

POMERANTZ, LEVY, HAUDEK & BLOCK, New York, N.Y. and
HOLLINSHEAD and MENDELSON, Pittsburgh, Pa., *for Class Plaintiffs-Appellants.*

WILLIAM E. HEGARTY, Esq., New York, N.Y. (Cahill Gordon & Reindel, New York, N.Y., Charles Platto, Esq. and Peter Leight, Esq., Of Counsel) and
REIN, MOUND & COTTON, New York, N.Y. (Maurice Mound, Esq., Of Counsel), *for Defendants-Appellees New York Mercantile Exchange, Richard B. Levine, Howard Gabler and Alfred Pennisi.*

LAWRENCE H. HUNT, Esq., Chicago, Ill. (Sidley & Austin, Chicago, Ill.) and
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD, New York, N.Y. *for Defendant-Appellee Heinold Commodities, Inc.*

W. STANLEY WALCH, Esq., St. Louis, Missouri (Thompson & Mitchell, St. Louis, Missouri, Gerard K. Sandweg, Esq. and Kenton E. Knickmeyer, Esq., Of Counsel) *for Defendant-Appellee Clayton Brokerage Co. of St. Louis, Inc.*

HALL, MCNICHOL, HAMILTON, CLARK & MURRAY, New York, N.Y. *for Defendant-Appellee Thomson McKinnon Auchincloss Kohlmeyer Inc.*

MARK D. YOUNG, Esq., Washington, D.C. (John G. Gaine, General Counsel, Pat G. Nicolette, Deputy General Counsel, and Gregory C. Glynn, Associate General Counsel, Washington, D.C., Of Counsel), *for Amicus Curiae Commodity Futures Trading Commission.*

FRIENDLY, Circuit Judge:

Plaintiffs in three consolidated actions in the District Court for the Southern District of New York appeal from an order of Judge, now Chief Judge, MacMahon, 470 F.Supp. 1256 (1979), granting appellees' motions for partial summary judgment. The court struck from the complaints all claims based on the Commodity Exchange Act, (CEA), 7 U.S.C. §§ 1-19, as amended in 1974, as distinguished from other claims under the antitrust laws. The actions were to recover damages allegedly suffered by the plaintiffs as a result of what Judge MacMahon characterized as

> the much publicized default in May 1976 of Maine potato futures contracts, when the sellers of almost 1,000 contracts failed to deliver approximately 50,000,000 pounds of potatoes, resulting in the largest default in the history of commodities futures trading in this country. 470 F.Supp. at 1258 (footnote omitted).

The basis for the court's order was that no private cause of action exists for breach of the CEA. Since this important issue has divided the district courts, including those within our circuit, we feel constrained

to discuss it in some detail.[1] We think it desirable, as did the district court, to begin with an explanation of the nature of the commodity futures markets.

I. COMMODITY FUTURES MARKETS

A commodity futures contract is simply a bilateral executory agreement for the purchase and sale of a particular commodity. The seller of the contract commits himself to deliver the commodity at a fixed date in the future, while the buyer commits himself then to accept delivery and pay the agreed price. 1 Bromberg & Lowenfels, Securities Fraud & Commodities Fraud § 4.6 (421)(1979); H. R. Rep. No. 93-975, 93d Cong., 2d Sess. 130 (1974). Every aspect of the futures contract is standardized except price. For example, the contract involved in this case, the May 1976 Maine potato futures contract, is for 50,000 pounds of Maine grown potatoes of a specified quality to be delivered at specified points in cars of the Bangor & Aroostook Railroad, between May 7 and May 25, 1976. Since price is the only variable, negotiations can readily proceed and the agreed prices can be speedily disseminated to

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1 The length of our treatment, particularly the explanation of the nature of the Commodities Futures Market in Part I and the history of congressional regulation in Part III, is also partly due to the fact that when the case was argued and for some time after the majority opinion was prepared, no court of appeals had passed on the question and we anticipated being the first to do so. However, in a case decided May 12, 1980, a divided panel of the Court of Appeals for the Sixth Circuit reached the issue *sua sponte* and, in an excellent and succinct opinion, held, as we do, on largely the same reasoning, that there is an implied private right of action under the CEA. *Curran* v. *Merrill Lynch, Pierce, Fenner and Smith, Inc.*, No. 77-1300, SRLR (BNA) G-1 (May 12, 1980). Although, as argued in the dissent, *Curran* involved a suit by a customer against a broker, the court did not limit its reasoning to that situation.

other traders. Standardization also makes the contracts fungible. Original sellers and buyers can therefore offset their positions by acquiring opposite contracts, either paying or gaining any price differential. H. R. Rep. No. 93-975, *supra*, at 130.

The person who has sold a futures contract, i.e., someone committed to deliver the commodity in the future, is said to be in a "short" position. Conversely, someone committed to accept delivery is "long". It is a rare case, however, in which actual delivery takes place pursuant to a futures contract.[2] Save in these rare instances, the short and the long must liquidate their positions prior to the close of trading in the particular futures contract. Although the means by which this is done is routinely referred to as futures trading, futures contracts are not "traded" in the normal sense of that word. Rather they are formed and discharged. Clark, *Genealogy and Genetics of "Contract of Sale of a Commodity for Future Delivery" in the Commodity Exchange Act*, 27 Emory L. J. 1175, 1176 (1978). A person seeking to liquidate his futures position must

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2 See H. R. Rep. No. 93-975, *supra*, at 129 (less than 3% of all futures contracts culminate in delivery); T. Hieronymus, Economics of Futures Trading 41 (1977) (less than 1%). Neither the speculative investor nor the person using the futures market as a hedge for his position in the market for the actual commodity generally desires delivery. H. R. Rep. N. 93-975, *supra*, at 129. See *Volhart Brothers, Inc.* v. *Freeman*, 311 F.2d 52, 55-56 (5 Cir. 1962); Note, *The Delivery Requirement: An Illusory Bar to Regulation of Manipulation in Commodity Exchanges* 73 Yale L. J. 171, 173 (1963).

In occasional instances, however, people do use futures trading as an alternative market for the physical commodity. H. R. Rep. No. 93-975, *supra*, at 132. Delivery is made through the clearing house by transfer of warehouse receipts or rights to loaded freight cars and then transported according to the purchaser's instructions. See *Cargill, Inc.* v. *Hardin*, 452 F.2d 1154, 1157 (8 Cir. 1971), *cert. denied*, 406 U.S. 932 (1972).

form an opposite contract for the same quantity, so that his obligations under the two contracts will offset each other. Thus, a short who does not intend to deliver the commodity must purchase an equal number of long contracts; a long must sell an equal number of short contracts. Money is made or lost in the price differential between the original contract and the offsetting transaction. If the price of the future has declined, usually because of market information indicating a drop in the price of the commodity, the short will realize a profit; if the futures price has risen, the long will realize a profit. See *Cargill, Inc.* v. *Hardin*, 452 F.2d 1154, 1157 (8 Cir. 1971), *cert. denied*, 406 U.S. 932 (1972). Futures trading is a zero-sum game. Since money is made from the change in futures contract prices, and every contract has a long and a short, every gain can be matched with a corresponding loss. See Melamed, *The Mechanics of a Commodity Futures Exchange: A Critique of Automation of the Transaction Process*, 6 Hofstra L. Rev. 149, 166 & n.39 (1977).

The mechanics of the commodity futures market, and the roles of the various participants, can be illustrated by tracing a typical transaction. An individual wishing to invest in the futures market approaches a "futures commission merchant" (FCM). FCM's are defined in the Commodity Exchange Act as individuals or associations "engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery . . . on . . . any contract market . . . ," § 2(a)(1), 7 U.S.C. § 2, and they are registered with the Commodity Futures Trading Commission (CFTC). The FCM will demand a "margin" payment from the customer, which is simply a security deposit designed to protect against adverse price movements. The amount of the margin is

based upon the amount which the customer can lose in a day or two; when the margin is exhausted the FCM will call the customer for additional payment. The margin is generally only a small percentage of the value of the contract. See Melamed, *supra*, 6 Hofstra L. Rev. at 167 & n.41. FCM's are paid a commission on their customer's business.

The FCM relays its customer's order to one of its "floor brokers" trading on the exchange. The broker stands on the outside of a "pit" or "ring" around which are gathered other persons trading in the same contract. Some of the traders are brokers acting on behalf of customers, while others trade on their own account. Contracts are made by "open outcry". The broker with an order will indicate his position at the pit by shouting and gesticulating with standardized hand signals. Someone willing to enter the contract responds across the pit in similar fashion, and the deal is made. Observers on raised pulpits alongside the pit record the transaction and feed the information into a communications system, publicizing it to other traders who, in any event, had an opportunity to witness the transaction in the pit. The broker relays the particulars of the deal to the FCM, who informs the customer.

When two traders have reached an agreement on the floor of the exchange, the role of the clearinghouse comes into play. The clearinghouse, a key link in the futures trading system, operates as the seller to all buyers and the buyer from all sellers, thus facilitating the interchangeability of the contracts and the cancelling of positions. H. R. Rep. No. 93-975, *supra*, at 149; S. Rep. No. 93-1131, 93d Cong., 2d Sess. 17 (1974); *Cargill, Inc.* v. *Hardin*, *supra*, 452 F.2d at 1156. Not all FCM's are clearinghouse members; those that are not

must deal through one that is. The clearinghouse treats FCM's as principals in trading transactions and demands margin payments from them. The clearinghouse requires FCM's to "mark to the market" at the close of every trading day. Any net gain or loss which the FCM has sustained in the course of the day's trading is computed and margin adjustments are made accordingly. Melamed, *supra*, 6 Hofstra L. Rev. at 167-68.

Generally speaking there are two classes of traders in commodity futures contracts, although, as some of the facts of the instant cases indicate, the distinctions between them are often quite blurred. A "hedger" is a trader with an interest in the cash market for the commodity, who deals in futures contracts as a means of transferring risks he faces in the cash market. See H. R. Rep. No. 93-975, *supra*, at 131, 133, 162. See also the complicated definition of "bona fide hedging transactions and positions" promulgated by the CFTC, 17 C.F.R. § 1.3(z). The owner of a commodity can hedge against declining prices by entering into equivalent short futures contracts for the month when he expects to be able to sell, and a processor (e.g., a miller) can hedge against increasing prices by going long for the month when he will need the commodity. Losses caused by a decline in prices on the cash market in the former case or an advance in the latter will be offset by profits in the futures transactions. See generally H. R. Rep. No. 93-975, *supra*, at 130-34; *Cargill, Inc.* v. *Hardin*, *supra*, 452 F.2d at 1157-58; Note, *supra*, 73 Yale L. J. at 171-73. The benefits of hedging extend beyond the immediate participants in the transactions. "Because hedging of price risks in a futures market enables a merchant to reduce the exposures he has in doing

business, he is able to operate on a lower profit margin with consequent lower prices to the consumer." H. R. Rep. No. 93-975, *supra*, at 132-33; see also S. Rep. No. 93-1131, *supra*, at 18; Valdez, *Modernizing the Regulation of the Commodity Futures Markets*, 13 Harv. J. Legis. 35, 40 (1975).

The system would not function, however, if only hedgers sold and purchased commodity futures contracts.[3] While hedging performs an insurance function, it is actually quite different from insurance. The risks faced by those dealing in the "cash" market, the market for the actual commodity, are not spread among those similarly situated, as with insurance, but rather are shifted to others. Bianco, *The Mechanics of Futures Trading: Speculation and Manipulation*, 6 Hofstra L. Rev. 27, 32 (1977); *Cargill, Inc.* v. *Hardin*, *supra*, 452 F.2d at 1158. The speculative investor, with no underlying interest in the cash market, is essential to take on the risks which the hedgers want to shift. The critical role of the "speculator" was described at some length in the House Report on the 1974 amendments:

> The principal role of the speculator in the markets is to take the risks that the hedger is unwilling to accept. The opportunity for profit makes the speculator willing to take those risks. The activity of speculators is essential to the operation of a futures market in that the composite bids and

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3 Johnston, *Understanding the Dynamics of Commodity Trading*, 35 Bus. Law. 705, 709 (1980), states that "[a]s a general rule, for a market to be broad enough to be efficient and to accomodate the extremely large orders that come in from time to time from dealers and commercial firms, 50 to 75 percent of the open interest and volume of trading must come from speculators—this is essential for there to be a viable market."

> offers of large numbers of individuals tend to broaden a market, thus making possible the execution with minimum price disturbance of the larger trade hedging orders. By increasing the number of bids and offers available at any given price level, the speculator usually helps to minimize price fluctuations rather than to intensify them. Without the trading activity of the speculative fraternity, the liquidity, so badly needed in futures markets, simply would not exist. Trading volume would be restricted materially since, without a host of speculative orders in the trading ring, many larger trade orders at limit prices would simply go unfilled due to the floor broker's inability to find an equally large but opposing hedge order at the same price to complete the match. H. R. Rep. No. 93-975, *supra*, at 138.

As commentators have noted, "Congress itself has recognized that the investor—although he is commonly referred to as a speculator in this context—is what makes the commodity futures market work . . . ." Bromberg & Lowenfels, *supra*, at § 4.6 (462).

Indeed, there is no bright-line difference between hedgers and speculators. Hedgers frequently do not merely balance their cash market risks in the futures market but engage in some speculation as well, buying or selling more or less futures contracts based on price expectations. Note, *Abuses in the Commodity Markets: The Need for Change in the Regulatory Structure*, 63 Geo. L. J. 751, 768-70 (1975); Valdez, *supra*, 13 Harv. J. Legis. at 64-65. On the other hand, speculators can become involved in the cash market as the activities of the plaintiff Incomco will demonstrate.

II. THE ALLEGED FACTS AND THE PROCEEDINGS BELOW

The facts alleged in the three complaints here before us are broadly as follows:[4]

John Richard Simplot is an Idaho potato entrepreneur who controls J. R. Simplot and Co., Simplot Products Co., Inc., and Simplot Industries, Inc. These corporations are responsible for "the processing of approximately 50% of all Idaho potato products processed and sold in the United States. Peter J. Taggares is a Washington potato entrepreneur. He and his company, P. J. Taggares Co., process approximately 30% of all the Washington potatoes processed and sold in this country. Simplot and Taggares are equal partners in the ownership of Simtag Farms, a large farm in the State of Washington for the growing and warehousing of potatoes. Together Simplot, Taggares, and the companies they control are the largest purchasers of potatoes throughout the western potato region of Washington, Idaho and Oregon.

According to the complaints, Simplot, Taggares, and the companies controlled by them, together with numerous co-conspirators, embarked in the spring of 1976 on a conspiracy to depress the price of the May 1976 Maine potato futures contract traded on the floor of the New York Mercantile Exchange (the "short conspiracy"). As stated by one of the complaints, "[b]y virtue of their position in the potato processing field and the quantity of potatoes purchased by them, [the

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4 We say here once and for all that our statement, in large measure, is simply what the plaintiffs contend to be the facts and is not to be read as one of facts found. Accordingly we will generally dispense with use of words such as "allegedly", "asserted" and "claimed".

conspirators] would be in a position to control the prices paid for potatoes but for the existence of the Exchange and the activity . . . in buying and selling potato futures contracts." Simplot had encountered difficulties in the course of his customary negotiations with the Idaho Potato Growers Association, because the IPGA believed that the price of potatoes, including Maine potatoes, would be much higher than what Simplot was offering. Futures prices supported this view. A report issued on April 13, 1976 by the United States Department of Agriculture indicated that total potato stocks were down 11%, and that Maine stocks totalled only 7.4 million cwt. compared with 13.0 million cwt. on hand the previous year. An earlier report issued in August 1975 estimated that national potato acreage would be down 8% from the previous year with an even greater drop in Maine. The effect of this latter report, and other generally available information, was to drive the price of the May 1976 Maine contract from $9.75 per cwt. to a record high of $19.15 per cwt. by October 3, 1975. The activities of the short conspirators were designed to counteract the impact of these reports and other market information and rumors tending to raise the price of Maine futures. A decline in the price of potato futures would suggest to those dealing in the cash market, such as the IPGA, that supplies of Maine potatoes would be greater than earlier anticipated, and that prices in spot transactions or negotiations for all potatoes should correspondingly recede.

The primary means by which the short conspirators sought to depress the futures price was the accumulation of a large net short position in the May contract. The conspirators allegedly agreed to sell a large number

of contracts short and to refuse to liquidate these shorts at a price higher than that agreed among themselves and, if necessary, to default on the obligation to make delivery on all unliquidated contracts. Such short purchases would give the impression of the existence of a large supply of deliverable Maine potatoes and drive down the price of the contract.

Simplot made $1 million available to Simtag Farms, which Simtag used to open a credit balance on March 29, 1976, with Pressner Trading Corp., a member of the New York Mercantile Exchange (the Exchange or NYME), for the purpose of buying and maintaining short positions in the May contract. At the same time, Simplot, Taggares and their other companies also began to accumulate a large number of short contracts. The brokers through which the conspirators acquired their positions included Clayton Brokerage Co. of St. Louis, Inc. (Clayton), Heinold Commodities, Inc. (Heinold), and Thompson & McKinnon, Auchincloss, Kohlmeyer, Inc. (Thompson). These three brokerage firms were, like Pressner Trading, clearing members of the Exchange and appropriately registered with the CFTC. The firms allegedly knew, or should have known, that their customers neither intended to nor would be able to cover the large number of short positions the brokers acquired for them.

On May 4, 1976, Simplot and Taggares were warned by the CFTC that it was aware of their large short position and that price manipulation was a violation of the Commodity Exchange Act. The telegram concluded that although this "is not an allegation of price manipulation, if prices of the May 1976 potato future . . . should become artificial during liquidation due to

your action or inaction, we will consider whether you and your firm should be charged with price manipulation under the Commodity Exchange Act." In the face of this warning, and the impending close of trading on May 7, the conspirators not only failed to take steps to liquidate their large short position but actually increased it, again with the help and support of the named brokerage firms. On the last day of trading they consolidated all the short positions they controlled in the hands of Pressner. Clayton, Thompson and Heinold knowingly acquiesced in this consolidation designed to concentrate the force of the manipulation.

In addition to the accumulation of a large net short position which they refused to liquidate at higher than an agreed price, the conspirators also allegedly manipulated the futures price by shipping large quantities of unsold Idaho potatoes to the Maine markets for immediate sale at the going price. The use of such so-called "roller cars", railroad cars of potatoes shipped although there is no pre-determined buyer, tends to depress the market price, and thus affect futures prices.

Simplot and Taggares were not the only group manipulating the price of the May future. A second group of eastern conspirators thought they could beat the western producers at their own game. Harold Collins and Casper Mayrsohn are Maine potato merchants and traders in Maine futures. MFX Commodities, Inc., with Donald Silver as its president, is a foreign corporation engaged in business as a FCM. This group learned of the conspiracy of Simplot and Taggares and conspired to squeeze them. Pursuant to this conspiracy (the "long conspiracy"), the "long" group purchased as many contracts as it could, and then at

the same time maneuvered to tie up the cash potato market so that the shorts could not make delivery. The longs reasoned that if the shorts had no access to deliverable potatoes, the longs would be able to dictate the price the shorts would have to pay to liquidate their contracts. The main way in which the longs tied up the cash markets was by tying up all of the rail cars of the Bangor & Aroostook Railroad, which alone could deliver potatoes to satisfy May futures contracts. This was done by using the cars for phony export shipments and leaving them loaded or only partially unloaded when they reached appropriate destinations.

Neither the longs nor the shorts would give in to the other. The shorts refused to liquidate their position by buying offsetting long contracts at higher than the price agreed among them; the longs refused to come down to the unreasonably low price demanded by the shorts. At the end of trading on May 7, the short conspirators controlled 1893 open short positions. The long conspirators controlled 911 open long positions. There are usually only approximately 200 open contracts at the end of trading on the May potato future.

The plaintiffs were caught in the middle between these two competing conspiracies. Neil Leist is a duly licensed member of the Exchange engaged in the business of trading commodities and futures for his own account. Incomco, a partnership, is a duly licensed FCM. Philip Smith is Incomco's managing partner. The class action plaintiffs are traders and dealers representing all persons "who held a net long position in Contracts and who liquidated their long position in said contract between April 13, 1976 and the close of trading on the Exchange on May 7, 1976."

On the basis of the same sort of information which motivated Simplot and Taggares to conspire to depress the price of the contract, plaintiffs believed there was an investment opportunity on the long side of the contract. If there was going to be a shortage of deliverable Maine round whites, those committed to deliver potatoes at a set price might well find this price to be under what the potatoes were worth. The shorts would then have to sustain a loss, either by purchasing potatoes in the cash market for the higher price and delivering them for the lower futures contract price, or by purchasing an offsetting long position. The price of the long position should have gone up due to the shortage, so that the shorts would lose the differential in liquidating. The shorts' loss would be the longs' gain, and it is this gain which the plaintiffs sought to realize by their investment.

All the plaintiffs invested heavily on the long side of the May contract. In addition, Incomco developed a position in the cash market. It had accepted 1,500,000 pounds of Maine potatoes delivered to it pursuant to the March futures contract, and planned to sell these potatoes to those short the May contract who needed supplies to satisfy their delivery obligations. Anticipating a cash market shortage, Incomco expected to sell its potatoes at a handsome premium.

Because of the conspiracies, however, plaintiffs not only did not realize the gains they claim they would have had in an unmanipulated market but suffered losses. The short conspirators continued to accumulate short positions when they should have been trying to liquidate by purchasing long contracts from plaintiffs, and refused to liquidate above a set price. In the face of the unnaturally falling price, the plaintiffs were forced

out of the market at a loss. Because the long conspirators had successfully tied up all the freight cars of the Bangor & Aroostook, Incomco was unable to deliver its warehoused potatoes to persons seeking delivery to fulfill short contracts. As the warm weather set in, the 1,500,000 pounds of potatoes became rotten, and Incomco's total investment was lost.

The Exchange allegedly figured in this debacle almost from the start. In March, Richard Levine, president of the Exchange, told plaintiff Leist that the Exchange was investigating the large number of open positions in the May contract. On April 28, two members of the CFTC eastern region office, Howard Bodenhamer and Marshall Horn, met with Levine and Howard Gabler, vice-president of the Exchange, to express their concern over the problems developing with the May contract. Levine recognized the problem and expressed the view that Simplot might be trying to create difficulties in the contract. A second meeting took place two days later, at which Bodenhamer told Levine that the Commissioners felt that "the Exchange should take more action than less to bring about orderly liquidations of the maturing futures."

Levine did not report these meetings with the CFTC to the Exchange's Board of Governors until after the close of trading on the May contract. Although the Exchange knew, or should have known, of both the short and the long conspiracies, it took no action to prevent manipulation of the market. The Exchange failed to declare an emergency situation pursuant to its rules to facilitate orderly liquidation, and, once trading had closed, failed to take appropriate steps such as permitting delivery by truck or buying potatoes to cover the default of the shorts.

The complaint in *Leist* v. *Simplot* was filed in the District Court for the Southern District of New York on September 30, 1976. Count I, directed against the short conspirators and their brokers, charged that the activities of the group constituted violations of 7 U.S.C. §§ 1-13 and, more specifically, that the group used and employed manipulative devices and contrivances in violation of 7 U.S.C. § 13, which makes such action a felony, and of rules promulgated by the CFTC. In addition to naming the brokers as conspirators, Count I specifically alleged that they "failed and neglected to enter liquidating orders" for the short conspirators prior to the close of trading "even though they knew that such short positions could not be covered and that there would be a default if the accounts were not closed out", permitted the short sales to be made and cooperated in making such short sales "although they knew or should have known that the sellers did not intend to and would be unable to cover such short positions." Count II of the complaint charged various violations of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, which are not subject to the present appeal. Count III was directed against the long conspirators, describing the facts outlined above and charging that such conduct violated 7 U.S.C. §§ 1-13. Count IV was directed against the Exchange and its officials. After repeating the earlier general allegations against the short conspirators, the complaint charged that these defendants "negligently failed to maintain an orderly market for trading in Maine Futures in violation of the duties imposed upon them under the provisions of the Act." The Exchange was also charged with failing to report the various violations alleged by the plaintiffs,

and with failing to direct the entry of liquidating orders for the account of members with net short positions prior to the close of trading even though the Exchange officials knew or should have known that the sellers would not and could not make delivery if the positions remained open.

The complaint in *Incomco* v. *New York Mercantile Exchange* was filed in the District Court for the Southern District of New York on June 16, 1976. This complaint was directed at the long conspirators and the Exchange, "acting separately and also in concert with" the long conspirators, for "blocking the availability of railroad cars, thereby creating an artificial and manipulative railroad car shortage" in violation of the Commodity Exchange Act, and against the Exchange for failing to follow its own regulations requiring it to buy in the cash market for the account of delinquent sellers so that outstanding obligations will be fulfilled. As in *Leist* v. *Simplot,* plaintiffs also included an antitrust charge.

The complaint in *National Super Spuds* v. *New York Mercantile Exchange* was filed in the District Court for the Southern District of New York on May 26, 1976. After consolidation with other actions and amendment, this class action complaint charged that the activities of the short sellers described above "violated the applicable provisions of the Commodity Act [and] acted as a manipulative force which artificially lowered the price of the Contract." Count II charged the short sellers with exceeding position and trading limits set by the CFTC in 17 C.F.R. § 150.10. Count IV was directed against the brokers for the short sellers, charging them

with violating Exchange Rule §§ 44.02[5] by failing to have liquidating orders placed although they knew or should have known that their customers could not deliver potatoes, permitting their customers to exceed position and trading limits imposed by the Act, and failing to report these and other violations of the Act, regulations, and Exchange rules by their customers of which they knew or should have known. Count V generally charged that the brokers, "with knowledge of intent of short Sellers to deflate the price of the Contract acquiesced and/or participated in the acts of Short Sellers." Count VI was directed at the Exchange, charging that it failed and neglected to report and concealed violations of the Act, regulations, and its own rules; failed and neglected to direct that liquidating orders be entered with respect to members which the Exchange knew or should have known would default; generally failed and neglected to perform its duties as a

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5 This reads as follows:

44.02-FINAL DAY OF TRADING

(a) On the final day of trading in the delivery month, it shall be the responsibility of each clearinghouse member who is not in a position to fulfill his contractual obligation on any maturing contract by prescribed notice and tender, to have a liquidating order entered on the Exchange floor not later than five minutes before the time established as the official close for such delivery month. All such orders shall be market orders to be executed prior to the expiration of trading.

(b) On the final day of trading no stop orders will be accepted; no time limit or contingent orders will be accepted, and brokers will not be expected to assume responsibility for the execution of orders placed later than 15 minutes prior to the close of trading.

(c) Cancellations that reach the trading floor after one half (½) hour prior to the time trading is scheduled to cease on the last day of trading in an expiring future may involve extraordinary problems and hence will be accepted solely at the risk of the customer.

contract market; and failed and neglected to exercise due care to halt manipulative practices. The three actions, all claiming extensive compensatory and punitive damages, were consolidated.

After answers had been filed and extensive discovery had been had, one phase of which has occupied the attention of this court, see *National Super Spuds* v. *New York Mercantile Exchange*, 591 F.2d 174 (2 Cir. 1979), three brokers, Clayton, Heinold and Thompson, and the Exchange and Exchange officials moved in the different actions for judgment on the pleadings under Fed. R. Civ. P. 12(c) or, in the alternative, for partial summary judgment under Fed. R. Civ. P. 56(b). Since he believed that all the parties had submitted factual material outside the pleadings, the judge considered the motions under Rule 56(b), although in fact the dispositive reasons so far as concerned the claims under the Commodity Exchange Act, which were all that were raised by the Exchange, the Exchange officials and Thompson, seem to have been wholly ones of law which could have been raised as well when the complaints had been filed two years earlier. In a thoughtful opinion issued on May 29, 1979, 470 F.Supp. 1256, Judge MacMahon held that there was no private right of action for damages under the Commodity Exchange Act, and granted summary judgment in favor of the moving defendants on those counts seeking recovery under that Act.[6] Partial final judgment was entered under Fed. R. Civ. P. 54(b) in favor of the moving defendants, and the plaintiffs took the instant appeal.

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6 For a precise statement of the motions and their disposition, see 470 F.Supp. at 1257 n.1, 1263-64.

III. THE HISTORY OF CONGRESSIONAL REGULATION OF COMMODITY FUTURES TRADING

Although our immediate concern is with the Commodity Exchange Act (CEA) as it now stands, it will be useful at this point to review the long history of Congressional regulation of commodity futures trading.

The first effort at such regulation was the Future Trading Act, 42 Stat. 187 (1921). This established the basic pattern of all regulation to follow, concentrating trading on central exchanges subject to the supervision and control of the federal government. The 1921 act levied a tax on all grain futures contracts not traded on a designated contract market. The Secretary of Agriculture was authorized to designate a board of trade as a "contract market" when the board, *inter alia*, "provides for the prevention of manipulation of prices." § 5(d), 42 Stat. 188. This provision has remained virtually unchanged to the present day, and is one of the provisions upon which plaintiffs seek to base a private right of action against the Exchange. The act also empowered a commission composed of the Secretary of Agriculture, Secretary of Commerce, and the Attorney General to suspend or revoke the designation of any board of trade failing to comply with the conditions of its designation, § 6(a), 42 Stat. 188, and to preclude any person violating the act or attempting to manipulate prices from trading on designated contract markets, § 6(b), 42 Stat. 189. Failure to pay the appropriate tax or keep required records made the violator guilty of a misdemeanor with a fine of up to $10,000 and/or imprisonment for up to one year. § 10, 42 Stat. 191.

The Future Trading Act was declared to be an unconstitutional exercise of the taxing power in *Hill* v. *Wallace*, 259 U.S. 44 (1922). It was redrafted immediately and enacted as the Grain Futures Act, 42 Stat. 998 (1922). The offending tax provision was deleted, and Congress, relying now on the commerce power, simply made it unlawful for any person to deal in futures contracts off a designated contract market, § 4, 42 Stat. 999-1000. The other operative provisions of the 1921 act were retained, with the aforementioned penalties now activated by violation of § 4 rather than the failure to pay a tax. A section on purposes was added, § 3, 42 Stat. 999. This section has been carried over virtually unchanged to the present day, see 7 U.S.C. § 5. The 1922 act was declared a constitutional exercise of the commerce power in *Board of Trade* v. *Olsen*, 262 U.S. 1 (1923). The 1921 and 1922 acts established the basic pattern of limiting trading to designated exchanges and regulating that trading by controlling designation of and access to the contract markets. The fine and imprisonment scheme for violations was also established.

Major additions, rather than revisions, were enacted by the Commodity Exchange Act, 49 Stat. 1491 (1936). Coverage was extended beyond grains to include commodities such as cotton, butter, and eggs. Section 4a was added, empowering the commission of the Secretary of Agriculture, Secretary of Commerce, and Attorney General to fix quantitative limits on speculative trading.[7] Here the short conspirators, with the

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[7] This provision currently reads as follows:

(1) Excessive speculation in any commodity under contract of sale of such commodity for future delivery made on or subject to

knowledge of the appellee FCM's, are alleged to have violated limits promulgated pursuant to this section. 17 C.F.R. § 150.10. The 1936 revisions also added § 4b, 49 Stat. 1493, the antifraud provision, essentially in its

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the rules of contract markets causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity. For the purpose of diminishing, eliminating, or preventing such burden, the Commission shall, from time to time, after due notice and opportunity for hearing, by order, proclaim and fix such limits on the amount of trading which may be done or positions which may be held by any person under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market as the Commission finds are necessary to diminish, eliminate, or prevent such burden. In determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person; and further, such limits upon positions and trading shall apply to positions held by, and trading done by, two or more persons acting pursuant to an expressed or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single person.

* * * * *

(2) The Commission shall in such order fix a reasonable time (not to exceed ten days) after the order's promulgation; after which, and until such order is suspended, modified, or revoked, it shall be unlawful for any person—

(A) directly or indirectly to buy or sell, or agree to buy or sell, under contracts of sale such commodity for future delivery on or subject to the rules of the contract market or markets to which the order applies, any amount of such commodity during any one business day in excess of any trading limit fixed for one business day by the Commission in such order for or with respect to such commodity; or

(B) directly or indirectly to hold or control a net long or a net short position in any commodity for future delivery on or subject to the rules of any contract market in excess of any position limit fixed by the Commission for or with respect to such commodity: *Provided*, That such position limit shall not apply to a position acquired in good faith prior to the effective date of such order.

present form.[8] New section 4d required the registration of FCM's and section 4e of floor brokers, while section 4g provided for the suspension or revocation of these registrations for violation of the Act or rules adopted thereunder. Section 5a added new duties of reporting for contract markets and some substantive obligations as well. Fines and imprisonment sanctions were extended to cover violations of the newly enacted provisions as well as old § 4, and were also applied to

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8 This provision currently reads as follows:

> It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—
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> (A) to cheat or defraud or attempt to cheat or defraud such other person;
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> (B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;
>
> (C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or exchange of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or
>
> (D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person.

anyone attempting to manipulate or manipulating the price of any commodity. 49 Stat. 1501.

By 1936, then, the major provisions which assertedly form the bases of the implied right of action against the FCM's, the trading limit, antifraud, and antimanipulation provisions, were already in place. One of the two additional provisions allegedly affording the basis for an action against the Exchange, § 5(d), had been law since 1921 and the other, § 5a(8), would be added in 1968.

The 1968 amendments, 82 Stat. 26, extended regulation to new commodities such as live cattle and pork bellies. The amendments added § 5a(8), as noted above, requiring a contract market to enforce all of its rules not disapproved by the Secretary of Agriculture.[9] Corresponding § 8a(7) was added empowering the Secretary to disapprove rules which violate or will violate the act or regulations. The penalty provision was altered somewhat, making FCM embezzlement and price manipulation felonies instead of misdemeanors, with a maximum prison term of five years instead of one. 82 Stat. 33-34. Section 6b was added, granting the Secretary the power to issue cease and desist orders against a contract market not enforcing its rules or violating the act. 82 Stat. 31-32.

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9 This provision currently reads as follows:

> (8) enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have been approved by the Commission pursuant to paragraph (12) of section 5a of this Act; and revoke and not enforce any such bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, which has been disapproved by the Commission.

In contrast to the limited scope of the 1968 amendments, the 1974 amendments, 88 Stat. 1389 (1974), constituted a complete overhaul of the Act. They broadened its coverage from the agricultural commodities with which it had historically been concerned to include "all other goods and articles . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in", subject to certain exceptions designed primarily to exclude securities. Consistently with this expansion in coverage, enforcement was transferred from the Department of Agriculture to a newly constituted Commodity Futures Trading Commission (CFTC). However, the amendments did not substantially alter any of the provisions which assertedly form the bases of an implied right of action. The antifraud and trading limits sections were basically unchanged. Maximum fines were increased from $10,000 to $100,000 in the penalty section.[10] Section 5(d), requiring a contract

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10 This provision currently reads as follows:

> It shall be a felony punishable by a fine of not more that $500,000 or imprisonment for not more than five years, or both, together, with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or to attempt to corner any such commodity, or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce or knowingly to violate the provisions of section 4, section 4b, section 4c(b) through section 4c(e), section 4h, section 4o(1), or section 19 of this Act, or knowingly to make any false or misleading statement of a material fact in any registration application or report filed with the Commission, or knowingly to omit in any application or report any material fact that is

market as a condition of designation, to prevent manipulation and cornering, remained unchanged, and § 5a(8) was altered so that exchanges were required to enforce their rules *approved* by the CFTC rather than those rules not *disapproved* by the Secretary.

The 1974 amendments required contract markets to provide arbitration procedures for settlement of customer grievances and claims not exceeding $15,000, § 5a(11). The CFTC was vested with power to compel exchanges to adopt additional rules, § 8a(7), and to bring actions to enjoin violations of the Act and compel compliance through writs of mandamus, § 6c. Finally, the reparations procedure in § 14 was established, of which more hereafter.

The history of congressional concern with commodity futures trading has thus been one of steady expansion in coverage and strengthening of regulation. In 1936, 1968, and 1974 new commodities came under the CEA. In each of these years the power of the regulatory authority were augmented, and penalties were either extended, increased, or both. The question of Congressional intent with respect to private sanctions under the Act must be considered against this background of increasingly strong regulation designed to insure the existence of fair and orderly markets.

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required to be stated therein. Notwithstanding the foregoing, in the case of any violation described in the foregoing sentence by a person who is an individual, the fine shall not be more than $100,000, together with the costs of prosecution.

IV. PRIVATE CAUSES OF ACTION UNDER THE COMMODITY EXCHANGE ACT PRIOR TO THE 1974 AMENDMENT

During the late 1940's, the 1950's, the 1960's and the early 1970's there was widespread, indeed almost general, recognition of implied causes of action for damages under many provisions of the Securities Exchange Act, including not only the antifraud provisions, §§ 10 and 15(c)(1), see *Kardon* v. *National Gypsum Co.*, 69 F.Supp. 512, 513-14 (E.D. Pa. 1946); *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783, 787 (2 Cir. 1951) (Frank, J.); *Fratt* v. *Robinson*, 203 F.2d 627, 631-33 (9 Cir. 1953), but many others. These included the provision, § 6(a)(1), requiring securities exchanges to enforce compliance with the Act and any rule or regulation made thereunder, see *Baird* v. *Franklin*, 141 F.2d 238, 239, 240, 244-45 (2 Cir.), *cert. denied*, 323 U.S. 737 (1944),[11] and provisions governing the

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11 While the point is of no great importance as regards this case, we take issue with the statements in the dissent, page 38, that *Colonial Realty Corp.* v. *Bache & Co.*, 358 F.2d 178 (2 Cir.), *cert. denied*, 385 U.S. 81 (1966), held that violation of a rule of the New York Stock Exchange could not give rise to an implied cause of action. Our conclusion was that violation of certain types of rules would give rise to an implied cause of action, especially "when the rule imposes an explicit duty unknown to the common law", but that violation of the rule there at issue, requiring brokers to observe "just and equitable principles of trade", did not. *Id.* at 182-83. We likewise do not accept the statement in footnote 8 that "it is now well recognized that a private right of action may not be implied for a violation of a rule of the New York Stock Exchange," citing *Jablon* v. *Dean Witter & Co.*, 614 F.2d 677 (9 Cir. 1980). Although the particular rule at issue in *Jablon*, the "know your customer" rule, Rule 405 of the New York Stock Exchange, seems analogous to the rule at issue in *Colonial Realty* and we thus have no quarrel with the result, we do not necessarily accept the broad language of the *Jablon* opinion. In view of our conclusion that plaintiffs have alleged violations of other sections of the Act which give rise to private claims, it is

solicitation of proxies, see *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 431-35 (1964). The *Baird* case is of special importance since the claim was of failure of the New York Stock Exchange to perform its duties—a claim paralleling that asserted here against NYME. Writing in 1961, Professor Loss remarked with respect to violations of the antifraud provisions that with one exception "not a single judge has expressed himself to the contrary." 3 Securities Regulation 1763-64. See also Bromberg & Lowenfels, *supra*, § 2.2 (462) (describing 1946-1974 as the "expansion era" in implied causes of action under the securities laws). When damage actions for violation of § 10(b) and Rule 10b-5 reached the Supreme Court, the existence of an implied cause of action was not deemed worthy of extended discussion. *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972).[12] Implied private

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unnecessary for us now to decide whether such an action would lie for violation of NYME Rule § 44.02.

So far as concerns the dissent's citation of *O'Neill* v. *Maytag*, 339 F.2d 764 (2 Cir. 1964), as a case denying a private right of action in the securities area, that decision rested on the scope of Rule 10b-5 and in no way challenged the proposition that a private cause of action would lie if the facts came within the Rule.

12 Indeed, at the time Congress considered and passed the 1974 amendments to the CEA, the Supreme Court had never rejected a request to imply a cause of action under the federal securities laws. Pitt, *Standing to Sue Under the Williams Act After Chris-Craft*, 34 Bus. Law. 117, 121 (1978).

The suggestion in the dissent that the *Superintendent of Insurance* case was a grudging acquiescence in 25 years of lower court decisions, although finding some support in a footnote to *Cannon*, 404 U.S. at 13 n.9, ignores the language of the opinion in *Superintendent of Insurance* and the climate of the times. The Supreme Court there reversed a decision of this court refusing to apply § 10(b) under circumstances which pressed that section to its absolute limit. The Court quoted not simply in acquiescence but with

causes of action under other statutes administered by the SEC were also widely recognized, see, e.g., *Goldstein* v. *Groesbeck*, 142 F.2d 422, 426-27 (2 Cir.), *cert. denied*, 323 U.S. 737 (1944) (Public Utility Holding Company Act); *Cogan* v. *Johnston*, 162 F.Supp. 907 (S.D.N.Y. 1958); *Schwartz* v. *Bowman*, 156 F.Supp. 361 (S.D.N.Y. 1957), appeal dismissed but holding on this point approved, *Schwartz* v. *Eaton*, 264 F.2d 195, 197-98 & n.5 (2 Cir. 1959); *Brown* v. *Bullock*, 194 F.Supp. 207, 220-21 (S.D.N.Y.), aff'd, with appellant conceding this point, 294 F.2d 415, 418 (2 Cir. 1961)(Investment Company Act);[13] see also *Caplin* v. *Marine Midland Grace Trust Co.*, 439 F.2d 118, 123 n.5 (2 Cir. 1971)(dictum), aff'd 406 U.S. 416, 426 n.17 (1972)(Trust Indenture Act). These statutes contained a

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strong approval the statement in *Shell* v. *Helmsley*, 430 F.2d 819, 827 (5 Cir. 1970):

> When a person who is dealing with a corporation in a securities transaction denies the corporation's directors access to material information known to him, the corporation is disabled from availing itself of an informed judgment on the part of its board regarding the merits of the transaction. In this situation the private right of action recognized under Rule 10b-5 is available as a remedy for the corporate disability.

And all this under a statute which *expressly* created three private actions, §§ 9(e), 16(b) and 18, with respect to various types of securities transactions that were far more efficacious than the reparations procedure of the 1974 amendments to the CEA. See 6 Loss, Securities Regulation at 3689-73 (1969), suggesting that for this and other reasons the *Borak* decision would not necessarily preclude a different ruling with respect to the existence of a private cause of action under § 10(b)—a ruling which never came.

13 Indeed, in several important cases under the Investment Company Act, defendants represented by able counsel did not even think it worthwhile to question the existence of an implied private cause of action. See, e.g., *Rosenfeld* v. *Black*, 445 F.2d 1337 (2 Cir. 1971), *cert. dismissed* 409 U.S. 802 (1972); *Moses* v. *Burgin*, 445 F.2d 369 (1 Cir.), *cert. denied* 404 U.S. 994 (1971); *Fogel* v. *Chestnutt*, 533 F.2d 731 (2 Cir. 1975), *cert. denied*, 429 U.S. 824 (1976).

panoply of other remedies—enforcement by the SEC, suspension, civil fines, criminal penalties, and some express private actions—which, with the exception of the administrative reparations remedy against one type of violator, were every bit as or more extensive than those in the CEA, but arguments that such provisions negated an implied private cause of action were regularly and firmly rejected, see, e.g., Judge Clark's much cited opinion in *Baird* v. *Franklin, supra,* 141 F.2d at 244-45; *Goldstein* v. *Groesbeck, supra,* 142 F.2d at 426-27; *Fratt* v. *Robinson, supra,* 203 F.2d at 632; *Dann* v. *Studebaker-Packard Corp.,* 288 F.2d 201, 208-09 (6 Cir. 1961). The question here is not whether all these decisions were wrong in the light of Supreme Court opinions of the past four years, as the dissent necessarily implies, but whether the 1974 Congress was not justified in assuming they would be followed with respect to the CEA.

Neither the generality and near unanimity of such interpretations of statutes regulating unfair securities practices, for which the CEA was the analogue with respect to futures trading,[14] nor similar decisions in

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[14] While there are differences between the commodities and securities fields, what is relevant to the present question is the common legislative objective of insuring fair dealing for investors on what are important public markets, and the common legislative approach to attaining this objective. The analogy between the two fields has been repeatedly recognized by Congress, see, e.g., S. Rep. No. 93-1131, *supra,* at 19; H. R. Rep. No. 93-975, *supra,* at 39. The 1936 amendments arose from an explicit concern to make protection in the commodities field as strong as it was in the securities field, lest the unscrupulous would simply transfer their operations from one market to another. H. R. Rep. No. 1522, 73d Cong., 2d Sess. 2 (1934); 78 Cong. Rec. 10446 (June 4, 1934) (Remarks of Chairman Jones of the House Committee on Agriculture); 79 Cong. Rec. 8589 (June 3, 1935) (same). The analogy has been frequently accepted by the courts, see, e.g., *Silverman* v. *CFTC,* 562 F.2d 432, 438 (7 Cir.

other fields, e.g., *Reitmeister v. Reitmeister*, 162 F.2d 691 (2 Cir. 1947)(action for damages implied from statute making interception of telephone calls a crime)(L. Hand, J.); *Fitzgerald v. Pan American World Airways*, 229 F.2d 499 (2 Cir. 1956) (action for damages implied from anti-discrimination provision of Civil Aeronautics Act although express remedies were complaint to CAB and criminal sanctions), were at all novel. They rested on principles recognized in a line of Supreme Court decisions going back to *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916). *Rigsby* sustained the right of a switchman to recover damages for violation of the Federal Safety Appliance Acts although the only express sanctions were penal. The Court there stated:

> A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied according to a doctrine of the common law expressed in 1 Com. Dig., *tit.* Action upon Statute (F), in these words: "So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a

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1977) (quoting Moore, J., in *Savage* v. *CFTC*, 548 F.2d 192, 197 (7 Cir. 1977)); *P. J. Taggares Co.* v. *NYME*, 476 F.Supp. 72, 77-78 (S.D.N.Y. 1979) (Weinfeld, J.); by the CFTC, see, e.g., brief *amicus curiae* at 12; and by the commentators, see, e.g., Markham and Meltzer, *Secondary Liability Under the Commodity Exchange Act*, 27 Emory L. J. 1115 (1978); Note, *Private Rights of Action for Commodity Futures Investors*, 55 B.U. L. Rev. 804, 821-22 (1975). Congress was not only aware of the implied right of action under the CEA in 1974, as shown below, but surely was also aware of the private right of action recognized in the analogous field of securities regulation.

> remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." (Per Holt, C.J., *Anon.*, 6 Mod. 26, 27.) 241 U.S. at 39.

Following *Rigsby* the Supreme Court recognized implied causes of action on numerous occasions, see, e.g., *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967) (sustaining implied cause of action by United States for damages under Rivers and Harbors Act for removing negligently sunk vessel despite express remedies of *in rem* action and criminal penalties); *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960) (sustaining implied cause of action by United States for an injunction under the Rivers and Harbors Act); *Tunstall v. Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944) (sustaining implied cause of action by union member against union for discrimination among members despite existence of Board of Mediation); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (sustaining implied private cause of action under 42 U.S.C. § 1982); *Allen v. State Board of Elections*, 393 U.S. 544 (1969) (sustaining implied private cause of action under § 5 of the Voting Rights Act despite the existence of a complex regulatory scheme and explicit rights of action in the Attorney General); and, of course, the aforementioned decisions under the securities laws. As the Supreme Court itself has recognized, the period of the 1960's and early 1970's was one in which the "Court had consistently found implied remedies." *Cannon v. University of Chicago*, 441 U.S. 677, 698 (1979); *id.* at 718 (Rehnquist, J., concurring) ("Cases such as *J. I.*

Case Co. v. Borak . . . and numerous cases from other federal courts, gave Congress good reason to think that the federal judiciary would undertake this task"). See generally Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 Harv. L. Rev. 285 (1963).

Given so many cases implying private rights of action under a broad range of statutes, both cognate (as in the instance of the securities legislation) and otherwise, supported by a goodly number of Supreme Court decisions and the reasoning behind them,[15] it was scarcely surprising that the courts that considered the question prior to the 1974 amendments unanimously upheld the implication of a private cause of action under the CEA. Indeed in the climate then prevailing it would have been almost unthinkable for the lower courts to have held that administrative and penal

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15 Although it is true, as stated in Justice Powell's dissent in *Cannon v. University of Chicago*, 441 U.S. at 735, that "During this same period, the Court frequently turned back private plaintiffs seeking to imply causes of action from federal statutes," 411 U.S. at 735, citing the same cases mentioned in Judge Mansfield's dissent, there can be no doubt that particularly in the closely related field of violations of statutes administered by the SEC, the implied cause of action was so much taken for granted that usually the issue was not even raised. See note 13 *supra*. There are many instances of this under the CEA itself, both before and after the 1974 amendments. See, e.g., *Booth v. Peavey Company Commodity Services*, 430 F.2d 132, 133 (8 Cir. 1970); *Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1176 (2 Cir. 1977) ("It is agreed that there is an implied cause of action under the Act for a private remedy."); *Hofmayer v. Dean Witter & Co., Inc.*, 459 F.Supp. 733, 737 (N.D. Cal. 1978). In addition, several courts have begun the process of delineating the precise contours of the private cause of action under the CEA, aided of course by the securities law analogy, assuming either *arguendo* or implicitly that such an action exists. See, e.g., *Miller v. New York Produce Exchange*, 434 U.S. 823 (1977); *Master Commodities, Inc. v. Texas Cattle Management Co.*, 586 F.2d 1352 (10 Cir. 1978); *Moody v. Bache & Co., Inc.*, 570 F.2d 523 (5 Cir. 1978); *P. J. Taggares Co. v. NYME*, *supra*, 476 F.Supp. 72.

remedies were adequate for the enforcement of private claims for economic loss caused by violation of this important effort by Congress to regulate the commodity futures markets. And they did not. The first reported case, frequently cited in later decisions, was *Goodman v. H. Hentz & Co.*, 265 F.Supp. 440 (N.D. Ill. 1967).[16] The unbroken line of decisions upholding a private right of action under pre-1974 law includes cases frm all of the major centers of activity in the commodity futures field. *Anderson v. Francis I. duPont & Co.*, 291 F.Supp. 705, 710 (D. Minn. 1968); *Hecht v. Harris, Upham & Co.*, 283 F.Supp. 417, 437 (N.D. Cal. 1968), modified, 430 F.2d 1202 (9 Cir. 1970); *United Egg Producers v. Bauer International Corp.*, 11 F.Supp. 1375, 1384 (S.D.N.Y. 1970); *Booth v. Peavey Company Commodity Services*, 430 F.2d 132, 133 (8 Cir. 1970); *McCurnin v. Kohlmeyer & Co.*, 340 F.Supp. 1338, 1343 (E.D. La. 1972), aff'd, 477 F.2d 113 (5 Cir. 1973); *Gould v. Barnes Brokerage Co., Inc.*, 345 F.Supp. 294, 295 (N.D. Tex. 1972); *Johnson v. Arthur Epsey, Shearson, Hamill & Co.*, 341 F.Supp. 764, 766 (S.D.N.Y. 1972);

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16 The dissent's suggestion, p. 36, that victims of frauds in futures trading had never resorted to the federal courts prior to *Goodman*, which was "the first case to break the barrier", lacks adequate empirical basis. Judge Carter's opinion in the Salad Oil case, *Seligson* v. *New York Produce Exchange*, *supra*, 376 F.Supp. at 1080, rendered in 1974, tells us that this swindle of the early 1960's "led to a string of lawsuits and investigations extending over the past ten years." It is not unlikely that many counsel for defendants confronted with the array of cases under the statutes administered by the SEC, did not think it worthwhile to question the existence of a private cause of action under the CEA—just as their counterparts in well-known cases under the Investment Company Act had failed to do so, see note 13 *supra*.

While we think the dissent's attacks on the reasoning of *Goodman* are exaggerated, this is irrelevant, since the courts followed and extended it without the slightest question, and Congress necessarily regarded these decisions, stretching over seven years, as representing the law.

Arnold v. Bache & Co., 377 F.Supp. 61, 65 (M.D. Pa. 1973); *Deaktor v. L. D. Schreiber & Co.*, 479 F.2d 529, 534 (7 Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973) (per curiam); *Seligson v. New York Produce Exchange*, 378 F.Supp. 1076, 1084 (S.D.N.Y. 1974), *aff'd sub nom. Miller v. New York Produce Exchange*, 550 F.2d 762 (2 Cir.), *cert. denied*, 434 U.S. 823 (1977).

It is true that most of these cases concerned fraud by a broker against his customers or churning of a customer's account, which was clearly within § 4b of the Act, but none stressed the broker-customer relation as either the basis or the limit of liability. And several did *not* involve fraud practiced by a broker on his customers. The most important of these is *Deaktor v. L. D. Schreiber & Co.*, 479 F.2d 529 (7 Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 11 (1973). Two cases were before the court. Plaintiffs in the first case sued the Exchange and various members alleging that the defendants manipulated the futures market for frozen pork bellies, a violation of CEA § 9(b), 7 U.S.C. § 13(b), artificially raising the price and thereby injuring those who, like the *Deaktor* plaintiffs, had sold short and were forced to liquidate their positions at higher prices (the converse of the situation of the plaintiffs in our case). The Exchange was also charged with violating CEA § 5a(8), 7 U.S.C. § 7a(8), the provision requiring an exchange to "enforce all bylaws, rules, regulations, and resolutions". Plaintiffs in the second case charged the Exchange with monopolizing trading in the fresh egg futures market, causing the price to fall and forcing plaintiffs to sell at artificially depressed prices. This conduct was alleged to violate the notice and hearing

provisions in Rule 217(D) of the Exchange, CEA §§ 52(8) and 9(b)(the criminal penalty provision for manipulation), 7 U.S.C. §§ 7a(8), 13(b), and the Sherman Act. The case reached the Seventh Circuit on denials of motions by the Exchange and other defendants to stay district court action pending the exercise of primary jurisdiction by the Commodity Exchange Commission. Having declined to defer to the primary jurisdiction of the Commission, the court reached the question whether private damage actions were allowable under the CEA. Citing numerous cases, the *Deaktor* court stated that "courts which have considered the question . . . have apparently uniformly concluded that such an action exists." *Id.* at 534. The court noted that the purpose of the Act was, in the language of the congressional reports, "to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves." The court further noted that § 9(b) of the Act made it a felony to manipulate prices, and concluded that in light of this provision and the general purpose of the Act, "we think the enactment is at least in part intended to protect the interests of the plaintiffs-traders in these actions," and therefore held that plaintiffs had a cause of action. *Id.* Thus, immediately before consideration of the 1974 amendments began, and only one year prior to their enactment by the Congress, the Court of Appeals with jurisdiction over the center where approximately 80% of all futures contracts were traded in the United States had clearly held that a private cause of action existed under the CEA—not simply for fraud by a

broker on his customer but for manipulation as well. The notion, strongly emphasized by the dissent, that such a decision escaped the knowledge of those framing the amendments, seriously underrates the expertise of our lawmakers and their staffs in subjects of particular concern to them.

Far from undermining the Seventh Circuit's recognition of an implied cause of action, the Supreme Court's reversal, 414 U.S. 113 (1973) (per curiam), on the ground that the court should have deferred to the primary jurisdiction of the Commission implicitly affirmed this recognition. Noting that " 'Congress has established a specialized agency that would determine either that a . . . rule of the Exchange has been violated or that it has been followed . . . ' ", the Court emphasized that " 'Either judgment would require determination of facts and the interpretation and application of the Act and Exchange rules . . . ' " and that " 'either determination will be of great help to the . . . court . . . . ' " *Id.* at 115, quoting *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 307 (1973). Thus the Court's reason for insisting on a determination by the Commission "in the first instance", 414 U.S. at 116, was that it would assist a court in hearing plaintiff's claims "in the second instance". The Court did not "decline to reach the issue" whether plaintiffs' claims were cognizable in federal court, as the dissent asserts (p. 40); it simply assumed that they were, as the Seventh Circuit had held.[16a]

Other cases upholding an implied cause of action outside the broker-customer relationship were *United*

[16a] Mr. Justice Stewart would have affirmed and allowed the action to proceed directly in the district court. 414 U.S. at 416.

Egg Producers v. Bauer International Corp., supra, 311 F.Supp. 1375, which recognized an implied cause of action under § 9(b) on behalf of various egg producers against an import-export firm, and *Seligson v. New York Produce Exchange, supra*, 378 F.Supp. 1076. *Seligson* arose out of the much-publicized "Salad Oil Swindle", and recognized an implied cause of action on behalf of the trustee in bankruptcy of a brokerage firm against the exchange, exchange officials, and the clearinghouse.[17]

While case based on pre-1974 facts decided after the 1974 amendment, apparently under pre-1974 law, are of less pertinence since the 1974 Congress could not have known of the decisions,[18] they deserve mention as

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17 We fail to appreciate the dissent's attempt to distinguish these two cases. With respect to *Egg Producers*, if implied private causes of action did not exist under the Act, there would be no cause of action for an injunction any more than there would be for damages. The *Seligson* decision was rendered before Senate consideration of the 1974 amendments and House repassage in the amended form. Moreover, what the dissent fails adequately to recognize is that the cases under the CEA, numerous and consistent as they are, cannot be taken in isolation but must be considered along with the vast body of law under the securities statutes which set the tone during the late '40's, the '50's, the '60's, and the early '70's, and on which the CEA decisions relied. The efforts to whittle all this away, pages 41-43, are unimpressive. We have already dealt, note 14 *supra*, with the argument as to the cases under Rule 10b-5. The contention that the securities legislation offered less in the way of remedies than the CEA would surprise most students of securities law; with the single exception of the 1974 reparations procedure for certain types of CEA violations, whose inadequacies are described below, they offered more. The argument that the sections of the CEA most heavily relied upon by plaintiffs were enacted before the explosion of the private right of action under the securities laws ignores the fact that the 1974 amendments to the CEA were intended to be a complete overhaul and were effected with vivid Congressional awareness of the decisions implying private causes of action under the CEA as well as the related subject of the laws administered by the SEC.

18 Congress was, however, apparently aware of the pendency of at least one of these cases. See note 30 *infra*.

indicative of the uncontradicted view of the law prevailing when Congress acted. In *Case & Co., Inc. v. Board of Trade*, 523 F.2d 355 (7 Cir. 1975)(Cummings, Stevens, and Tone, JJ.), plaintiff sued the Board and its governors for violating §§ 5a(1) and 5a(8) of the CEA in suspending trading limits on soybean futures. The court began its discussion of liability by stating that "[i]t is undisputed that a private cause of action may be maintained under the Commodity Exchange Act. See *Deaktor* . . . ." *Id.* at 360. In *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 103 n.8 (7 Cir. 1977), the same court flatly stated that "[p]rivate damage actions are allowable under the CEA. See, e.g., *Deaktor* . . . ." See also *Bartley v. P.G. Commodities Associates, Inc.*, CCH Com. Fut. L. Rep. ¶ 20,123 [1975-77 Transfer Binder] (S.D.N.Y. 1975) (churning complaint under § 4b).

We see no need to burden this opinion with detailed examination of district court decisions concerning whether the 1974 amendments eliminated the private cause of action theretofore unanimously recognized. The courts have divided although the weight of authority is in favor of continued implication.[19] As noted, the only court of appeals to have considered the issue has held that a private cause of action should be implied. *Curran v. Merrill Lynch*, note 1 *supra*.

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19 Cases finding an implied cause of action: *Milani* v. *ContiCommodity Serv., Inc.*, 462 F.Supp. 405 (N.D. Cal. 1976); *Shearson Hayden Stone* v. *Lumber Merchants, Inc.*, 423 F.Supp. 559 (S.D. Fla. 1976); *Bache Halsey Stuart, Inc.* v. *French*, 425 F.Supp. 1231 (D.D.C. 1977); *Kelley* v. *Carr*, 442 F.Supp. 346 (W.D. Mich. 1977), rev'd on other grounds, Nos. 78-1091, 1092, 5542, 5460 (6 Cir., May 16, 1980); *Hofmayer* v. *Dean Witter & Co.*, 459 F.Supp. 733 (N.D. Cal. 1978); *Berenson* v. *Madda Trading Co.*, CCH Comm. Fut. L. Rep. ¶ 20,689 (D.D.C. 1978); *Gravois* v. *Fairchild, Arabatzis & Smith, Inc.*, CCH Comm. Fut. L. Rep. ¶ 20,706 (E.D. La. 1978); *Rivers* v.

V. THE CONTINUED EXISTENCE OF THE PRIVATE CAUSE OF ACTION

In deciding the issue here before us, we follow the analysis set forth in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975).[20]

Rosenthal & Co., Civ. Action File No. CV 178-186 (S.D. Ga. 1978), appeal pending, 79-1313 (5 Cir.); *Poplar Grove Planting and Refining Co., Inc.* v. *Bache Halsey Stuart Inc.*, 465 F.Supp. 585 (N.D. La. 1979); *Jones* v. *B. C. Christopher & Co.*, 466 F.Supp. 213 (D. Kansas 1979); *R. J. Hereley & Son* v. *Stotler & Co.*, 466 F.Supp. 345 (N.D. Ill. 1979); *Aiken* v. *Lerner*, Civ. Action No. 79-0023 (D.N.J. 1980); *Navigator Group Funds* v. *Shearson Hayden Stone Inc.*, 77 Civ. 5350 (S.D.N.Y. 1980) (Broderick, J.); *Grayson* v. *Conticommodity Services, Inc.*, 48 L.W. 2807 (D.D.C., May 23, 1980); *Witzel* v. *Chartered Systems Corporation of New York, Ltd.*, 48 L.W. 2823 (D. Minn., May 27, 1980).

To the contrary, in addition to Judge MacMahon's opinion in this case, 470 F.Supp. 1256, see *Arkoosh* v. *Dean Witter & Co.*, 415 F.Supp. 535 (D. Neb. 1976), aff'd on other grounds, 571 F.2d 437 (8 Cir. 1978); *Consolo* v. *Hornblower & Weeks-Hemphill, Noyes, Inc.*, 436 F.Supp. 447 (N.D. Ohio 1976); *Bartels* v. *International Commodities Corp.*, 435 F.Supp. 865 (D. Conn. 1977); *Berman* v. *Bache Halsey Stuart, Shields, Inc.*, 467 F.Supp. 311 (S.D. Ohio 1979); *Alkan* v. *Rosenthal & Co.*, CCH Comm. Fut. L. Rep. ¶ 20,797 (S.D. Ohio 1979); *Liang* v. *Hunt*, 477 F.Supp. 891 (N.D. Ill. 1979); *Fischer* v. *Rosenthal & Co.*, 481 F.Supp. 53 (N.D. Tex. 1979); *Stone* v. *Saxon and Windsor Group, Ltd.*, CCH Comm. Fut. L. Rep. ¶ 31,100 (N.D. Ill. 1980). The three decisions from district courts in Ohio which declined to find an implied cause of action, *Consolo*, *Berman*, and *Alkan*, are no longer good law in that circuit in light of the Sixth Circuit's contrary decision in *Curran* v. *Merrill Lynch*, cited in note 1 *supra*.

20 This is:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," *Texas & Pacific R. Co.* v. *Rigsby*, 241 U.S. 33, 39, 60 L. Ed. 874, 36 S. Ct. 482 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, e.g., *National Railroad Passenger Corp.* v. *National Assn. of*

There is, however, one differentiating factor of such transcendent importance as to demand mention at the outset. As shown in Part IV of this opinion the decisions prior to the 1974 amendments had uniformly upheld the existence of a private cause of action under the provisions of the Commodity Exchange Act, and as will be shown in this part, the 1974 Congress was well aware of the existing state of the law. Even without more, the question thus would not be whether Congress intended to create a new private right of action in 1974, but rather whether it intended *sub silentio* to alter the significance that had long been given these provisions by making other changes in the Act. Beyond this, however, we do not need to *assume*, as the Court stated would be "appropriate" in upholding a private cause of action in *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-97 (1979), "that our elected representatives, like other citizens, know the law" or to "presume" that they "were aware of the prior interpretation" of a

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Railroad Passengers, 414 U.S. 453, 458, 460, 38 L. Ed. 2d 646, 94 S. Ct. 690 (1974) (*Amtrak*), *supra*; *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 423, 44 L. Ed. 2d 263, 95 S. Ct. 1733 (1975); *Calhoon* v. *Harvey*, 379 U.S. 134, 13 L. Ed. 2d 190, 85 S. Ct. 292 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? *See Wheeldin* v. *Wheeler*, 373 U.S. 647, 652, 10 L. Ed. 2d 605, 83 S. Ct. 1441 (1963); cf. *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 434, 12 L. Ed. 2d 423, 84 S. Ct. 1555 (1964); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394-395, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971); *id.* at 400, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (Harlan, J., concurring in judgment).

We read this in light of the later *caveat* in *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575 (1979) that the basic inquiry is always to plumb the intent of Congress, that the *Cort* factors are simply inquiries helpful in that endeavor, and that satisfaction of one or more of the *Cort* factors will not alone carry the day.

related statute. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute"). Here the existence of an implied right of action under the Commodity Exchange Act as it stood in 1974 was repeatedly called to the attention of and implicitly approved by Congress. This alone sufficiently answers appellees' claim that if the 1974 Congress wished to create a private cause of action, it would and should have said so and that it is implausible to suppose that "Congress absentmindedly forgot to mention an intended private action." *Cannon, supra*, 441 U.S. at 742 (Powell, J., dissenting). Whether rightly or wrongly in light of recent Supreme Court jurisprudence, the courts had read a private cause of action into the statute, just as they had done with statutes of similar import in related fields, and Congress knew that they had done so. The burden thus lies on those who urge that the 1974 amendments demonstrate an intention to change prior law, or, paraphrasing the language from Mr. Justice Powell's *Cannon* dissent, *supra*, that, in making the changes that it did, Congress "absentmindedly forgot" to repeal the private cause of action. The silence of the 1974 Congress with respect to private causes of action for violations of the CEA, on which the dissent leans so heavily, is no more significant than the similar silence of the 1975 Congress which extensively amended the Securities Exchange Act, 89 Stat. 97. When a principle has become settled through court decisions, there is no occasion for Congress to speak unless it wishes a change.[21]

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[21] We find little force in the dissent's reliance, page 33 and footnote 11, on the failure of the 1968 Congress to enact a section of a bill introduced by Representative Fino providing an explicit right of

1. Taking the first of the *Cort* factors, we have no difficulty in concluding, despite appellees' claims to the contrary, that the plaintiffs were among "the class for whose especial benefit the statute was enacted," a phrase going back to *Texas & Pacific R. Co.* v. *Rigsby*, *supra*, 241 U.S. at 39. Although Congressional committees and sponsors of the ill-fated 1921 legislation devoted most of their eloquence to injuries suffered by producers at the hands of wicked speculators, the Senate Report on the 1922 Act recognized that:

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action against exchanges. Quite apart from the usual problems of relying on actions of an earlier Congress, and much more on its failure to act, see p. 59 *infra*, the question of a private right of action was simply not considered by Congress in the 1968 amendment process. The bill that became the 1968 amendments, H. R. 13094, never contained a private remedy provision, such a remedy was never mentioned in either congressional report, and was never discussed in congressional debate. The dissent's picture of Congress' carefully comparing the bills and deliberately and meaningfully rejecting the provision in Rep. Fino's bill is indeed based on gossamer. Since the failure to act on the provision in 1968 is only of the slightest significance with respect to congressional intent at that time, its bearing on the effort to discern congressional intent six years later, in 1974, is infinitesimally small.

Beyond all this, when Rep Fino introduced his bill with the explicit right of action provision, he included with his speech numerous newspaper articles about the commodities industry. One of these discussed the Great Salad Oil Swindle, and noted that two attorneys for the receiver of Ira Haupt & Co., a brokerage firm which went under in that affair, "are trying to determine whether Haupt can justifiably file suit against the exchange for failure to regulate . . . ." Haupt eventually did, and the court recognized an implied right of action against the exchange, see *Seligson* v. *New York Produce Exchange*, *supra*, 378 F.Supp. 1076. If Congress had given any consideration to Rep. Fino's bill, it could well have failed to enact the explicit remedy provision because it considered this unnecessary in light of the then judicial climate, as had turned out to be the case for Ira Haupt & Co. before the 1974 amendments were passed, see note 17 *supra*. This further illustrates that attempting to attach meaning to the failure of Congress, and even more so of a previous Congress, to enact legislation is a speculative enterprise indeed.

> Transactions in grain futures are utilized by the public for speculation and by the grain trade for the purpose of eliminating or reducing, as far as practicable, the hazards in the merchandising of grain and its products and by-products due to price fluctuations. Public speculation helps to carry the risk for the producers, dealers, and millers who wish to hedge their cash grain transactions. S. Rep. No. 871, 67th Cong., 2d Sess. 3 (1922).

It is true that much of the debate on the floor of the House consisted of vituperative attacks on those "gambling" in the grain trade to the detriment of the producers and the consumer. However, these attacks were generally directed at *big* speculators, i.e., those in a position to manipulate the market, and there was always the recognition that "legitimate trade" was acceptable and indeed beneficial.[22] The emphasis on producers in § 3, the statement of purposes in the 1922 Act, was due to a desire to state a basis clearly within then existing notions of the commerce power rather than to risk invalidation by including classes whom the Supreme Court might not think to come within it; *Wickard* v. *Filburn*, 317 U.S. 111 (1942), then lay twenty years in the future.[23] At that time, moreover,

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22 See, e.g., 62 Cong. Rec. 9404 (June 26, 1922) (Remarks of Chairman Tincher of the House Committee on Agriculture) ("I have never said that the sale of wheat for future delivery should be wiped out . . . but have always said, and I still say, that to let a few gamblers manipulate the grain market was not only unfair to the consumer but unfair to the legitimate trader."); *id.* at 9412 (Remarks of Rep. Voight, a member of the Committee on Agriculture which reported out the bill) ("The bill will reduce gambling but we can not stop it altogether without hurting both consumer and producer").

23 The Court in *Hill* v. *Wallace*, *supra*, had noted that the tax imposed by the 1921 Act applied to sales between members of the

the importance of the speculator in the efficient functioning of the futures market had not yet been so fully recognized by Congress as it has now become.

It is plain in any event that by the time of the 1936 amendments, as was later to be stated in the House Report on the 1978 amendments, "the community protected under federal commodities law was expanded to include speculators." H. R. Rep. No. 95-1181, 95th Cong., 2d Sess. 84 (1978). As described in the 1935 House Report, "The fundamental purpose of the measure is to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves." H. R. Rep. No. 421, 74th Cong., 1st Sess. 1 (1935). "Fair practice and honest dealing" are, of course, beneficial not only to farmers but also to legitimate speculators using the market. The concern expressed in the last clause of the quotation, to avoid injury to "the exchanges themselves", certainly encompassed protection for those using the exchanges. This was made clear in a later passage from the same report:

Board of Trade in Chicago. "Looked at in this aspect, and without any limitation of the application of the tax to interstate commerce, or to that which Congress may deem, from evidence before it, to be an obstruction to interstate commerce," the Court could not sustain the Act. 259 U.S. at 68. Congress responded with § 3, precisely focusing on the interstate aspects of futures trading. See 62 Cong. Rec. 9404 (June 26, 1922) (Remarks of Chairman Tincher of the House Committee on Agriculture) ("We have defined interstate commerce, using the language of the Supreme Court, as applying to grains and this law will not apply to any transaction except interstate transactions as defined by the court."); *id.* at 12723 (Sept. 15, 1922) (The Court "called attention to the fact that if grain was in interstate commerce we could reach the situation in this bill; and this bill is strictly following the dictation . . . of the Supreme Court . . .").

"[The bill] simply provides for honesty in the conduct of what are important public markets. This affects vitally the interests of the people, whether they be producers or consumers of the commodities covered by the bill or whether they belong to that class of citizens who have a fondness, and perhaps some aptitude for speculative investment in commodities and who like to test their judgment concerning values and price trends by occasional and moderate speculation therein." *Id.* at 2-3. While the debates in Congress, like those in 1922, did contain many attacks on speculative investors, again there was a recognition of the necessary role of speculators, and the focus of the attacks was on the big manipulator, whose activity was perceived to be detrimental not only to producers and consumers but also to those referred to as "legitimate" traders and dealers.[24] The clearest indication of Congress' concern

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24 Representative Jones, Chairman of the House Committee on Agriculture, stated that the bill was aimed at eight to sixteen traders on the Chicago Board of Trade "who have been largely responsible for the constant fluctuations in the market . . . ." 78 Cong. Rec. 10446 (June 4, 1934). He later stated that the purpose of the bill was "to check manipulation of markets by certain big traders [who] rig the market to the detriment not only of the producer but also of all others engaged in legitimate transactions in various farm commodities." 79 Cong. Rec. 8589 (June 3, 1935). Another Representative considered the bill to be directed against "the speculators who deal in large quantities," 78 Cong. Rec. 10449 (June 4, 1935) (Remarks of Rep. Gilchrist); a third favored it to counter the activities of "15 or 20 big grain manipulators," and noted it "will not injure but will beneficially affect legitimate dealers," *id.* at 10451 (Remarks of Rep. Sabath). The Senate debates were to the same effect. The bill was designed to clip the wings of the likes of Arthur Cutten, a big grain manipulator whose activities were considered in some detail. See 80 Cong. Rec. 6160 (April 27, 1936) (Remarks of Sen. Pope). Senator Pope specifically recognized the critical role played by the typical speculator:

> it is the small traders—those who take positions in the market of less than 100,000 bushels—that not only absorb the hedging sales but who furnish the real support for future trading in grains. In

to regulate the large-scale market operator is, of course, the authorization of trading limits in § 4a.

The legislative history of the 1968 amendments continued the recognition of the critical role played by speculative investors and the attack on big or powerful manipulators rather than speculators in general. Both the House and Senate reports explicitly recognized that most futures trading was done by speculators. H. R. Rep. No. 743, 90th Cong., 1st Sess. 2 (1967); S. Rep. No. 947, 90th Cong., 2d Sess. (1968), reprinted in 2 U.S. Code Cong. & Admin. News 1675 (1968). The House Report noted that such speculative activity carried with it "the danger that on occasion powerful traders will attempt to influence prices," H. R. Rep. No. 743, *supra*, at 2, but also recognized the necessary role of the legitimate speculator: "This speculative activity provides a means of reducing price risks by persons handling the actual commodity and thus makes possible higher prices to producers and lower prices to consumers." *Id.*

Finally, and most important, the concern to protect the speculator as well as the hedger was clearly evident in the enactment of the 1974 amendments. The House Report noted the large influx of speculators into the commodity futures market as one of the "specific situations mandat[ing] a comprehensive rewrite of futures trading regulation". H. R. Rep. No. 93-975, *supra*, at 39. The beneficial, indeed indispensable, role of such speculators was recognized not only in the House Report, in the language quoted in Part I of this opinion, *id.* at 138, but also in the debate on the floor of

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the main their trading is so diffused and scattered that as a body they lend a stabilizing influence. *Id.* at 6164.

the House. Introducing the bill, Chairman Poage of the Committee on Agriculture observed that speculators "provide a very real service to the market and its users, by providing liquidity." 119 Cong. Rec. 41332 (Dec. 13, 1973). Representative Wampler, the ranking minority member of the House Committee and a supporter of the bill, stated that:

> While the speculator has been much maligned to the point where critics of the present marketing system have tried to make "speculator" a dirty word, we must not forget that the speculator performs an important economic function in futures markets. He is, in effect, the risk bearer who assumes the risks which the hedger seeks to avoid. 120 Cong. Rec. 10739 (April 11, 1974).

The debates reveal that one problem prompting the amendments was the catastrophic losses suffered by futures traders, mostly "speculators", who were dealing in commodities not regulated by the old act. See 119 Cong. Rec. 41332 (Dec. 13, 1973) (Remarks of Chairman Poage). In extending regulation to previously unregulated futures markets, the House Report specifically stated that "[t]here is no reason why a person trading in one of the currently unregulated futures markets should not receive the same protection afforded to those trading in the currently regulated markets." H. R. Rep. No. 93-975, *supra*, at 76. In other words, the old act protected those trading in the markets—not merely producers or consumers of the commodity—and the new act would extend this protection of traders to new markets in which even fewer of the traders produced or consumed the actual commodity.

Senate consideration of the 1974 amendments reinforced the views evident in the House. The Senate Report opened with a quotation from Justice Holmes, *Board of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236, 247-48 (1905), recognizing the virtues of speculation:

> People will endeavor to forecast the future and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices and providing for periods of want. S. Rep. No. 93-1131, *supra*, at iii.

Like the House Report, the Senate Report recognized the role of "the competitive effect of many speculative buyers and sellers in the market" in reducing merchandising price margins. *Id.* at 12. The Senate changed the House bill to provide for an independent CFTC, rather than one under the USDA, since it was concerned that the USDA's historic role as the spokesman for farm interests might affect its policing of commodity markets. See *id.* at 21-22. This clearly evinces a concern to protect those trading on the commodity futures markets, and not simply agricultural producers. Accord, 120 Cong. Rec. 30467 (Sept. 6, 1974) (Remarks of Sen. Taft). Senator Dole considered the purpose of the 1974 amendments to be "to protect any individual who desires to participate in futures market trading," *id.* at 30466, and Chairman Talmadge of the Senate Committee on Agriculture and Forestry wrote that "all of the members of the committee who worked on this legislation had one goal in mind—to develop a strong, but fair regulatory scheme that will protect *investors*,

businessmen and consumers." 120 Cong. Rec. 34996 (Oct. 10, 1974) (emphasis supplied).

It is true, of course, that the CEA was enacted for the benefit of the entire public, as hopefully most regulatory legislation is. But, as is the case with respect to all such legislation, criminal as well as civil, some classes are more in need of protection than others. It is almost self-evident that legislation regulating future trading was for the "especial benefit" of futures traders.[25] Hence it is not surprising that the courts have thus been nearly unanimous in concluding that "speculators", now long recognized to be legitimate investors, as well as hedgers, are within the class for whose especial benefit the CEA was enacted, see especially *Smith* v. *Groover, supra*, 468 F.Supp. at 113; *Gravois* v. *Fairchild, Arabatzis, et al., supra*, CCH Com. Fut. L. Rep. ¶ 20,706. Indeed, even those courts finding no implied right of action under the Act as amended in 1974, including the district court in this case, 470 F.Supp. at 1259, have generally concluded that the first prong of the *Cort* test was satisfied. See, e.g., *Berman* v. *Bache, Halsey, Stuart, Shields, Inc., supra* 467 F.Supp. at 322 ("little question"); cf. *Fischer* v. *Rosenthal & Co., supra* (assuming *arguendo* that plaintiff met the first *Cort* test, "as indeed he may"). More importantly, this court itself is on record to that effect. In *Ames* v. *Merrill Lynch, Pierce, Fenner & Smith, supra*, 567 F.2d 1174, where we refused to grant a stay of plaintiff's private damage action and

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25 The securities cases suffice to negate the dissent's suggestion that regulated persons may not also belong to the class for whose special benefit the regulation was enacted. Here Congress made clear that it wished to regulate "bad" speculators for the benefit of good ones, as well as hedgers and simple buyers and sellers.

compel arbitration, the parties having agreed that an implied cause of action existed under the Act, Judge Gurfein wrote that "[w]e have no doubt that the Act itself, *enacted as it was for the protection of investors*, prohibited a surrender of private remedies through an agreement to arbitrate which was not voluntary in the sense that the penalty for refusal was exclusion from the market." *Id.* at 1179 (emphasis supplied).[26] See also *Silverman* v. *CFTC*, 562 F.2d 432, 438 (7 Cir. 1977) ("We must be mindful of a Congressional purpose, clearly evidenced at least since 1933, to protect the American investing and speculating public not only from fraud and fraudulent practices, but from those whose past actions indicate that they might be tempted to engage in such practices") (quoting Moore, J., in *Savage* v. *CFTC*, 548 F.2d 192, 197 (7 Cir. 1977)).[27]

2. We turn now to the second and evidently the most important, see *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. at 575, of the *Cort* factors, "is there any indication of legislative intent, explicit or implicit, either to create such a [private] remedy or to deny one?" 422 U.S. at 78. This inquiry requires an intensive examination of the legislative history of the 1974

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26 While the dissent chooses to characterize this as a "passing reference", it shows the clear understanding of the writer that the Act was enacted to protect speculators and not merely hedgers.

27 The only discordant note on the point that the CEA was intended to protect "speculators" appears to be *Liang* v. *Hunt*, 477 F.Supp. 891 (N.D. Ill. 1979), a distinct minority view from which the dissent liberally quotes. The commentators have joined the courts' nearly unanimous chorus on this point. See Bromberg & Lowenfels, *supra*, § 462(1) (concluding that "the commodity laws' lack of emphasis on investors is only apparent, not real"); Note, *Private Rights of Action for Commodity Futures Investors*, 55 B.U. L. Rev. 804, 826 (1975) ("the statute's clear purpose—to increase existing protection of commodity futures investors").

amendments. We conduct this, of course, with full awareness of the cautions in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 204 n.24 (1976) and *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 31-32 (1977), against the dangers of undue reliance on "passing references" by others than the Congressional committees or sponsors or on general statements not directly relevant to the issue at hand.

In our view the legislative history amply demonstrates the 1974 Congress' awareness of the uniform judicial recognition of private rights of action under the Commodity Exchange Act and a desire to preserve them. We are not, as the dissent suggests, "presuming" that Congress was aware of these decisions; the evidence of its awareness is overwhelming.

We begin with the House Report. This noted that when exchange self-regulation first developed, "[V]ery little thought was probably given to whether the failure to meet [stated] ideals would expose the exchanges to legal liability . . . ." H. R. Rep. No. 93-975, *supra*, at 45. The report stated that this view began to change early in the 1920's. "Perhaps the adoption of federal regulatory legislation spurred this total reorientation of the relationship between exchanges and the public. Slowly, the courts began to look upon exchange regulation as a guarantee to the public that its members would not violate its code of conduct." *Id.* In 1968, the report continued, amendments to the CEA required exchanges to enforce their rules, § 5a(8). The existence of private rights of action was thought to have had a perverse effect on the effectiveness of this legislation which the report explicitly noted:

> In the few years this provision has been in the present Commodity Exchange Act, there is grow-

> ing evidence to indicate that, as opposed to strengthening the self-regulatory concept in present law, such a provision, coupled with only limited federal authority to require the exchanges to make and issue rules appropriate to enforcement of the Act—may have actually have worked to weaken it. With inadequate enforcement personnel the Committee was informed that attorneys to several boards of trade have been advising the boards to *reduce*—not expand exchange regulations designed to insure fair trading, since there is a growing body of opinion that failure to enforce the exchange rules is a violation of the Act which will support suits by private litigants. (emphasis in original).

Later in the Report the Committee noted that one of the specific problems "brought to [its] attention" was the:

> Growing difficulties facing exchanges in self-regulatory actions as a result of *private plaintiffs seeking damages* against the markets. As examples, *exchanges are sued* for actions taken in emergency situations even when the action has been taken at the request (or order) of the CEA. *Id.* at 48 (emphasis supplied).

Nothing in the report, however, indicated dissatisfaction with the private right of action; the objective was to deal with the attendant reduction in exchange rulemaking. This was to be accomplished by empowering the CFTC to require exchanges to adopt rules, § 8a(7).[28]

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[28] The House Report also contained a letter from the Department of Justice to Chairman Poage of the House Committee on Agriculture.

The existence of an implied private right of action was also clearly revealed to Congress in the debate on what became the 1974 amendments. Introducing the bill, Chairman Poage used the language quoted above, which eventually appeared in the House Report, about the change in the legal posture of exchange self-regulation. He then remarked that "when the Commodity Exchange Act was enacted, courts implied a private remedy for individual litigants in the Commodity Exchange Act." 119 Cong. Rec. 41333 (Dec. 13, 1973).[28a] He went on to note, as would the House report, that as "the judgment of the board of directors of many of the exchanges in implementing decisions under self-regulatory functions is becoming increasingly a justiciable issue," attorneys were advising exchanges to prune out rules they might not be able to enforce in order to avoid the threat of liability in private actions. This threat was described as providing the exchanges with a "solid reason" for retrenching on self-regulatory efforts. *Id.* At the outset of consideration by the whole

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wherein the Department representative twice cited to the recent Supreme Court decision in *Deaktor, supra*, 414 U.S. 113. The letter concerned the interrelation between exchange rules and antitrust law, and the author, discussing the doctrine of primary jurisdiction, referred to "situations where the challenged activity is *alleged to violate the Commodity Exchange Act* as well as antitrust laws". H. R. Rep. No. 93-975, *supra*, at 26 (emphasis supplied). *Deaktor* was cited as a case, obviously brought by a private plaintiff, which alleged violations of the CEA. Any legislator who read this should thus have been aware that private individuals could sue exchanges for violations of the CEA; they had done so in *Deaktor*, and the Supreme Court had merely required an initial resort to the regulatory agency for its views where these would be useful.

28a The dissent chooses to make a point, footnote 16, that Chairman Poage was in error since the first decision implying a private right of action under the CEA was made in 1967 rather than 1966. We fail to see the significance of this.

House, then, the legislators were informed by the Chairman of the Committee considering the bill that private rights of action were implied under the Act.[29] This was not a mere passing reference, but a critical statement of fact that was a necessary step in explaining why new legislation was needed. The 1974 amendments signaled a dramatic shift from the theory of exchange self-regulation to authorization of the CFTC to compel the exchanges to alter or adopt rules, § 8a(7), and the proponents of the amendments were at pains to explain the need for such a shift. This explanation centered on the existence of an implied private right of action. Amendments were required to force exchanges to adopt beneficial rules because the threat of the judicially implied private right of action had led them to shirk this responsibility. Congress could not have understood why it was changing the underlying theory from exchange self-regulation to compulsory regulation without recognizing that the private rights of action that had been judicially implied under the Act demanded this change. It opted to cure the problem that had developed not by abolishing the private right of action but by empowering the CFTC to require the exchanges to adopt appropriate rules. No amount of labored parsing can obscure the self-evident truth that Congress knew the courts were implying private rights of action and did nothing to alter this. It

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29 The point was repeated later by Representative Thone, a member of the Committee on Agriculture. See 120 Cong. Rec. 10748 (April 11, 1974) ("Some observers believe that the provision of the 1968 amendments requiring exchanges to enforce their own rules, *thereby implicitly giving private parties the right to sue for nonenforcement*, has had a perverse effect. To avoid risk of litigation, exchange authorities have been encouraged to reduce rather than strengthen rules designed to insure fair trading").

matters little whether this be called recognition or approval.

The House hearings are replete with references to the maintenance of private causes of action under the Act. A representative of various New York commodity exchanges informed the House Committee on Agriculture that the Chicago Board of Trade was at that very moment the target of a $200 million class action,[30] and urged Congress to "take steps to insure that federally regulated exchanges are not exposed to this sort of astronomical civil liability suits . . .", *Hearings on Review of Commodity Exchange Act and Discussion of Possible Changes Before the House Committee on Agriculture*, 93d Cong., 1st Sess. 121 (1973), something which Congress did not do. Another exchange representative and FCM, discussing the arbitration procedures to be required of contract markets, told the House Committee that "In addition to these arbitration procedures, complainants *of course* have access to the courts." *Hearings on H. R. 11955 Before the House Committee on Agriculture*, 93d Cong., 2d Sess. 249 (1974) (emphasis supplied). A letter sent in the course of the just-cited hearings from Continental Grain Co. indicates that the cases cited in Part IV of this opinion may well have been only the tip of the iceberg—the cases where the private cause of action was challenged and was sustained in a published opinion. The letter calls to the Committee's attention "one recent class action settlement proceeding in court" which required the mailing of 339,000 legal notices and resulted in legal fee claims of over $2,250,000. *Id.* at 321. The

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30 The reference was apparently to *Case & Co., Inc.* v. *Board of Trade*, *supra*, 523 F.2d 355, see p. 31 *supra*.

letter advocated requiring complainants to choose between arbitration or settlement procedures and resort to courts "which have already held they have jurisdiction over private complaints based on violations of the present law." *Id.*

The existence of a private right of action also was repeatedly indicated during the Senate hearings on the four bills to amend the CEA. *Hearings on S. 2485, S. 2578, S. 2837, and H. R. 13113 Before the Senate Committee on Agriculture and Forestry*, 93d Cong., 2d Sess. (1974). Senator Clark and a commodities law expert, Professor Schotland of Georgetown University, expressed the view that private actions were available under the Act, *id.* at 205, 737, 746. A representative of the Minneapolis Grain Exchange objected to the settlement procedure contemplated for contract markets because the claims which exchanges would be required to adjudicate were not limited by any dollar amount and wished these to be confined to cases where the smallness of the claim entailed an "economic impediment to Court litigation." *Id.* at 415. Such a limit appeared in the bill as enacted, § 5a(11)(ii). The President of the Kansas City Board of Trade urged the Senators to protect exchanges "from unnecessary and costly defenses of lawsuits" brought under the Act. *Id.* at 317. He had made the same request before the House, with similar lack of success. *Hearings on H. R. 11955, supra*, at 123.[31] We shall have more to say about

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[31] The dissent relies heavily on a chart introduced during the Senate Hearings, reproduced at footnote 14, to support the conclusion that Congress did not preserve the previously recognized private right of action in 1974. The chart was not prepared by Congress, the relevant Senate Committee, or even a single legislator, but rather by the committee staff. There is no suggestion that in preparing the chart the staff went beyond the explicit provisions of the CEA; the chart

Congress' awareness of the private cause of action and its desire to preserve it when we come to discuss the provision preserving the jurisdiction of the courts. However, what we have developed up to this point is alone sufficient to invoke "the well-recognized canon of construction that the reenactment of a statute incorporates preceding judicial interpretations", *Van Vranken* v. *Helvering*, 115 F.2d 709, 710 (2 Cir. 1940) (L. Hand, J.), *cert. denied*, 313 U.S. 585 (1941)—a canon which, as shown by the *Van Vranken* case, is not limited to interpretations by the Supreme Court. See *Electric Storage Battery Co.* v. *Shimadzu*, 307 U.S. 5, 14 (1930); *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978); *Bennett* v. *Panama Canal Co.*, 475 F.2d 1280, 1282 (D.C. Cir. 1973) (Wyzanski, J.) ("the almost irrebuttable presumption which followed from reenactment with knowledge [of the Fifth Circuit's interpretation of "may" as permissive]"). This canon applies with particular force to the instant case, where the 1974 amendments constituted "the first complete overhaul of the Commodity Exchange Act since its inception," H. R. Rep. No. 93-975, *supra*, at 1, the relevant substantive provisions were left unchanged, and Congress had been made acutely aware of the prior judicial construction that these provisions gave rise to a private cause of action.[32]

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does not purport to deal with the broad subject of civil money "damages", but only with the subject of civil money "penalties". If the chart had attempted to deal with the broader subject of damages, it could have reached only one conclusion, namely, that there was an implied private right of action, since this was the unanimous view of the courts prior to the 1974 amendments.

32 The dissent argues that none of the pre-1974 cases, with the exception of *Deaktor*, was expressly cited to by Congress and that

The Supreme Court has applied this principle on numerous occasions. In *Lorillard* v. *Pons*, 434 U.S. 575 (1978), Justice Marshall, writing for a unanimous Court, said that when Congress has passed a new statute incorporating sections of a previously construed statute, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change"—even though, as indicated above, the interpretations were by lower federal courts and not by the Supreme Court. It was considered significant that the judicial construction of the previous statute had been unanimous, *id.* at 580-81, as was the judicial implication of private rights of action prior to 1974 in our case. In *Georgia* v. *United States*, 411 U.S. 526, 532-33 (1973), the Court was confronted with a question concerning interpretation of the Voting Rights Act, enacted in 1965 and extended after "extensive deliberations" in 1970, with changes and additions in areas other than the section before the Court. The Court had reached a decision on a related question in the 1969 case of *Allen* v. *State Board of Elections*, 393

Congress' failure to mention *Deaktor* is "highly significant" (p. 43). We fail to see why. As we have developed, there is a plethora of evidence that Congress was well aware in 1974 that courts had consistently implied private rights of action under the CEA. This fact was brought out in the House Report, congressional debate, and hearings before both houses, and was crucial to an understanding of specific aspects of the bill. In light of this it is quite irrelevant that specific case names or citations were not mentioned. In all likelihood this was simply because no one particular case was crucial. *Every* pre-1974 case confronting the question had found an implied right of action without limitation in the opinions to the specific relationships at issue—a result foreordained by the history of decisions under the securities laws—and *Deaktor*, which itself had long been foreshadowed by *Baird* v. *Franklin*, *supra*, 141 F.2d 238, decided nearly thirty years before, thus was not a novelty.

U.S. 544 (1969). Justice Stewart reasoned that "[h]ad Congress disagreed with the interpretation of § 5 in *Allen*, it had ample opportunity to amend the statute. After extensive deliberations in 1970 on bills to extend the Voting Rights Act, during which the *Allen* case was repeatedly discussed, the Act was extended for five years, without any substantive modification of § 5." 411 U.S. at 533. A footnote to this quotation indicated that the "repeated discussions" were in Congressional hearings. *Id.* n.5. While we have here no Supreme Court decision of the stature of *Allen* construing the CEA, since the Court's opinion in *Deaktor*, 414 U.S. 113, was not an express holding of the existence of a private cause of action under the CEA, *all* the pre-1974 CEA cases, including the Seventh Circuit's decision under review in *Deaktor*, reached the same result in favor of implication, and decisions sustaining private rights of action were called to the attention of Congress not only in Congressional hearings as in *Georgia* v. *United States* but in the House report and in floor debates.

The presumption just referred to is, of course, rebuttable and appellees insist it has been rebutted by changes made in the CEA in 1974. Before taking these up in detail, we note certain circumstances in addition to those already discussed that require an exceedingly strong showing of an intention to abolish the private cause of action for fraud, manipulation and violations by exchanges that had been universally recognized in order to justify a conclusion that this was Congress' intent. The 1974 Congress repeatedly expressed its view that the changes were designed to *strengthen* commodity futures regulation, a goal that would be ill-served by abolishing the private right of action that everyone had thought to exist. The bill that became the

1974 amendments was described on its face as "an act to amend the Commodity Exchange Act *to strengthen the regulation of futures trading* . . . ." H. R. 13113, 93d Cong., 2d Sess. 1 (1974) (emphasis supplied). The original hearings in the House on the bill were called by the Committee on Agriculture "with a view toward strengthening and revising the existing law." H. R. Rep. No. 93-975, *supra*, at 53-54. The remarks on the floor of the House by the Committee chairman and the ranking minority member repeated this theme. See 120 Cong. Rec. 10736 (April 11, 1974) (Remarks of Rep. Poage) ("to strengthen the regulation of futures trading); *id.* at 10739 (Remarks of Rep. Wampler) ("to inform and strengthen the laws"). The goal in the Senate was the same. See, e.g., S. Rep. No. 93-1131, *supra* at 18 (section entitled "Need for Better and Extended Regulation"). See also *Curran* v. *Merrill Lynch, supra*, note 1 at G-8 ("the legislative history of the CFTC Act . . . indicates that Congress intended to extend further protection to the exchange customer, rather than to extinguish existing forms of protection"). Yet the appellees would have us take the forbidden course of ascribing to Congress an intent with respect to private sanctions completely at odds with this clear legislative purpose. See *National Petroleum Refiners Association* v. *Federal Trade Commission*, 482 F.2d 672, 690 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) (Wright, J.) ("where a statute is said to be susceptible of more than one meaning, we must not only consult its language; we must also relate the interpretation we provide to the felt and openly articulated concerns motivating the law's framers"), and generally Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 Harv. L. Rev. 370 (1947).

In support of this endeavor to rebut the presumption that the 1974 Congress approved the previous interpretation of the CEA, the appellees point to the new reparations procedure of § 14. This authorizes any person complaining of any violation of the Act or any rule, regulation or order by any person registered or required to be so,[33] to apply to the CFTC. If the Commission thinks there are reasonable grounds for investigating the complaint, it shall do so. The Commission may, if in its opinion the facts warrant such action, serve the respondent, who is entitled to a hearing before an Administrative Law Judge except where the amount claimed does not exceed $5,000 in which event the Commission may proceed on the basis of depositions or verified statements of fact. A reparations order is enforceable by suit in a district court. However, this is subject to a right of the respondent to seek a prompt review of the reparations order in a court of appeals.

Quite apart from the provision explicitly preserving judicial remedies which we shall discuss later, the argument that Congress intended this to be the sole private remedy under the CEA is totally unconvincing for several reasons. The first and perhaps the most important reason is the limited scope of the reparations remedy. It is available only against persons who have or should have registered. On appellees' argument, the exchanges which, to the clear knowledge of Congress, had been held subject to private suits before the 1974 amendments, would be wholly relieved of private liability, although Congress failed to heed their

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33 These are FCM's and certain persons associated with a FCM, §§ 4d, 4k; floor brokers, § 4e; and commodity trading advisors and pool operators, § 4m.

repeated pleas for explicitly granting such relief.[34] So too would large unregistered operators, alleged to have committed the most flagrant kind of manipulation, like Simplot and Taggares in the instant case—the very type of persons whose activities had been the subject of particular Congressional concern from the outset. We find it unimaginable that after a half century's devotion to the regulation of futures trading, thirty years of exposure to the liberal implication of private causes of action under the related subject of securities regulation, and knowledge that the courts had consistently applied the same principle to the CEA, the 1974 Congress could have meant that the only federal remedies for persons claiming to have been wronged by such defendants to the extent of millions of dollars should be the small solace of having the Government collect civil fines and enforce administrative or criminal penalties. The dissent cannot paper over this gaping hole by saying, fn. 3, that such operators are not before us. They are defendants, probably the principal defendants, in these actions. While they have understandably chosen to stay in the background in the present argument, acceptance of the dissent's position would compel the district court to dismiss the CEA claims against them. Even with respect to registered persons, the one class of defendants to whom the reparations procedure applies, the remedy hinges upon the Commission's preliminary determination, apparently unreviewable, that the com-

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[34] See *Hearings on Review of Commodity Exchange Act and Discussion of Possible Changes Before the House Committee on Agriculture, supra,* at 121; *Hearings on H. R. 11955 Before the House Committee on Agriculture, supra,* at 123; *Hearings on S. 2485, S. 2578, S. 2837, and H. R. 13113 Before the Senate Committee on Agriculture and Forestry, supra,* at 317.

plainant has a *prima facie* case, and there is no assurance that this will afford the procedural benefits available in a civil trial. The case differs fundamentally from instances such as *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers (Amtrak)*, 414 U.S. 453 (1974), and *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. 560, where Congress, operating on a *tabula rasa*, provided a new duty and certain express remedies to enforce that duty, and the Court applied the maxim *expressio unius est exclusio alterius*. When as here Congress adds a new remedy to enforce a preexisting duty, where other remedies had been clearly recognized, it would be expected to say so if it meant the new remedy to be exclusive. In fact, as will be seen, it said the opposite. It is just as much "judicial legislation" for a court to withdraw a remedy which Congress expected to be continued as to improvise one that Congress never had in mind.

These conclusions are strengthened by the legislative history of the reparations procedure. Chairman Poage, in an apparent reference to the reparations provisions, noted in the House that the Act "sets up new customer protection features." 120 Cong. Rec. 10737 (April 11, 1974). This language suggests that the "new" features are in addition to the "old" ones, and certainly not that they are exclusive. In the Senate, Chairman Talmadge remarked:

> The vesting in the Commission of the authority to have administrative law judges and apply a broad spectrum of civil and criminal penalties is likewise not intended to interfere with the courts in any way. It is hoped that giving the commission this authority will somewhat lighten the burden upon the courts, but the entire appeal process and the

> right of final determination by the courts are expressly preserved. 120 Cong. Rec. 30459 (Sept. 9, 1974).

The first sentence strongly suggests that Congress did not intend to repeal private rights of action by enacting the reparations procedure, and the second sentence is not to the contrary. If the reparations procedure was intended to be exclusive, then it *certainly* would lighten the burden on the courts, even with review of reparations orders by the courts of appeals. But the Senator spoke in terms of "hope" and lightening the burden "somewhat"—as if reparations were an alternative he hoped had been made attractive enough to sway some aggrieved traders away from the courts. The second clause relating to judicial review simply noted that even for those who elected reparations there could still be court involvement. Again the House Report describes the reparations procedures as "intended as a separate remedy designed to supplement the informal 'settlement' procedures contemplated of the contract markets and registered futures associations which are required under other sections of the legislation . . . ." H. R. Rep. No. 93-975, *supra*, at 22. These last two types of settlement procedures, however, are expressly made voluntary by the Act. See §§ 5a(11), 17(b)(10). It can therefore be inferred that the reparations remedy is of the same character, and that the aggrieved trader is in no sense compelled to resort to reparations to obtain relief. Commentators have relied on this reasoning, and the savings clause in § 2(a)(1), in concluding that "the victim of a CEA violation is free to ignore the reparations procedure and file a lawsuit." Bromberg & Lowenfels, *supra*, § 461 at 82.362 (1979). The CFTC is

of the same view. See 41 F.R. 3994 (Jan. 27, 1976); *id.* at 18472 n.5 (May 4, 1976).[35]

The argument that the reparations procedure was intended to be the exclusive private remedy is further

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35 The dissent argues, despite all these contrary indications, that the reparations procedure was designed to be the exclusive private remedy beyond informal settlement. In support of this it quotes a letter from Earl Butz, Secretary of Agriculture, published in the House Report, which states that the reparations procedure "should make possible full and equal justice for those who feel that they have been in some way damaged in the handling of their commodity accounts." The dissent underscores this language, although it is not at all clear what about it suggests that reparations were intended to preclude private actions rather than constitute an additional remedy for aggrieved persons to whom the burden of litigation might be prohibitive. In any event it is irrelevant to our case. The plaintiffs seeking relief before us are not complaining about the handling of their accounts but rather of broad market manipulation. The dissent further stresses a passage from the House Report where it is stated that the Commission "will have original jurisdiction to consider all such complaints" which have not been resolved informally. Again, nothing in this suggests that Commission jurisdiction of reparations proceedings was meant to preclude the jurisdiction of the courts which had been widely recognized. The dissent also relies on the ceiling for civil penalties against exchanges in § 6b of $100,000, arguing that allowing private recovery for "unlimited" damages would be inconsistent with this ceiling. Penalties and damages, however, are quite different in nature. The former are punitive and some limit on the regulator's discretion to impose them is necessary. The latter are remedial and naturally limited to the loss caused by the defendant. Further, the dissent's argument proves too much. There is a limit of $100,000 on the fines which can be imposed on a FCM under § 6(b), but the FCM's are subject to "unlimited" private recovery in reparations. Congress obviously saw no inconsistency between allowing recovery for actual damages and limiting fines. Finally the dissent states that under § 6b fines against exchanges are limited to "an amount which will not 'materially impair the contract markets' ability to carry on its operations and duties.'" P. 47. Rather the CFTC is required to *consider* whether a fine will have this effect; the only ceiling in § 6b is the $100,000 maximum, which, incidentally, is not an "overall" limitation as the dissent states but rather a limit per violation. (For example, each day of failure to comply with a cease and desist order is a separate violation, § 6b). Concern for an FCM's ability to carry on business is specifically required to be considered in § 6(d), yet FCM's are subject to full damages in reparations.

negated and the case for the continuance of the private cause of action is enhanced by the jurisdictional savings clause, § 2(a)(1).[36]

As passed by the House, the exclusive jurisdiction provision read as follows:

> *Provided*, that the Commission shall have exclusive jurisdiction of transactions dealing in, resulting in, or relating to future delivery . . . *And provided further*, that nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission or other regulatory authorities under the laws of the United States . . . .

The purpose of this was to separate the functions of the new CFTC from those of the SEC and other regulators. As explained in the House Report, "All commodities trading in futures will be brought within federal regulation under the aegis of the new Commission, however, provision is made for preservation of Securities Exchange Commission jurisdiction in those areas traditionally regulated by it." H. R. Rep. No. 93-975, *supra*, at 3. See generally Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy*, 29 Vand. L. Rev. 1 (1976); Russo & Lyon, *The Exclusive Jurisdiction of the Commodity Futures Trading Commission*, 6 Hofstra L. Rev. 57 (1977). The provision was not intended to limit the jurisdiction of

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36 Plaintiffs do not seek to base their right of action on this jurisdictional provision, but rather point to it as evidencing a congressional concern to preserve existing rights of action. Appellees' criticism, derived from *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 577, that plaintiffs' rights must be found in substantive and not jurisdictional provisions, is therefore inapt.

the courts. See *Jones* v. *B. C. Christopher & Co., supra,* 466 F.Supp. at 218-19.

However, there was fear that it would do so and numerous objections were raised to the House provision in the Senate hearings. Admittedly some of these were not primarily concerned with the question of court jurisdiction to hear claims in private actions under the CEA. Chairman Rodino of the House Committee on the Judiciary was concerned that the House provision might be read as pre-empting state courts of their jurisdiction to enforce futures contracts under general commercial law and "to oust even federal courts of jurisdiction". Testifying before the Senate Committee, he suggested an amendment "to define the jurisdiction, including antitrust jurisdiction, of federal courts for commodity transactions." *Hearings on S. 2485, S. 2578, S. 2837 and H. R. 13113 Before the Senate Committee on Agriculture and Forestry, supra,* at 259-60. While Chairman Rodino's remarks were focused on antitrust jurisdiction, they were not limited to that. He argued generally that federal courts retained jurisdiction, and cited antitrust jurisdiction as an example supporting this view. Other objections to the exclusive jurisdiction provision of the House bill were explicitly addressed to the preservation of private rights of action.[37] Senator Clark noted that treble damages actions, provided in bills which he and Senator McGovern had introduced,

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[37] See also testimony of Deputy Assistant Attorney General Clearwater of the Antitrust Division, *id.* at 663, to which Chairman Talmadge responded: "I have read your statement in its entirety, and I doubt that this committee, and I doubt the House had in mind depriving either Federal courts or [sic] jurisdiction in antitrust matters, *or any other matter,* and certainly not State courts." *Id.* at 664 (emphasis supplied).

were often the most effective enforcement tools.[38] "Unfortunately, the House bill not only does not authorize them but section 201 of that bill may prohibit all court actions. The staff of the House Agriculture Committee has said that this was done inadvertently and they hope it can be corrected in the Senate." *Id.* at 205. Professor Schotland did not refer directly to the exclusive jurisdiction provision, but urged rather that the reparations provision, if retained at all, should be accompanied by "explicit language in the statute that Federal and State courts are still open if a complainant prefers to go to trial there." *Id.* at 737, 747.

The upshot of these various objections was the addition by the Senate of the "savings clause", now in § 2(a)(1):

> nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or of any State. S. Rep. No. 93-1131, *supra*, at 54.

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38 Defendants and the dissent suggest that the failure to enact these bills is evidence of legislative intent to repeal the private right of action. This suggestion is unpersuasive. None of the bills provided a simple private right of action for actual damages. Rather, two of the proposals, H. R. 11195 and S. 2378, would have expanded the previously judicially recognized right of action by providing for treble damages for any violation; and one bill, S. 2837, provided treble damages for a willful violation and actual damages for nonwillful violations. The dissent's argument that it would have been simple to change the bills so as to eliminate the provision for treble damages ignores that trebling was what the proposers wanted. Simple damages were recoverable under existing law. We have not "ignored" the discussion in the *Amtrak* case, 414 U.S. at 461, as the dissent charges, p. 45, where Congress failed to adopt an amendment that would have altered the interpretation which the Secretary of Transportation had placed on the proposed act. It is simply inapposite.

The purpose of this change was stated to be to "make clear that . . . Federal and State courts retain their jurisdiction." *Id.* at 6. The Conference accepted the Senate amendment, with the same stated purpose. S. Rep. No. 93-1194, 93d Cong., 2d Sess. 35 (1974); H.R. Rep. No. 93-1383, 93d Cong., 2d Sess. 35 (1974). The respective chairmen of the House and Senate committees reported that "the conferees wished to make clear that nothing in the act would supersede or limit the jurisdiction presently conferred on courts of the United States or any State. This act is remedial legislation designed to correct certain abuses which Congress found to exist in areas that will now come within the jurisdiction of the CFTC." 120 Cong. Rec. 34997 (Oct. 10, 1974) (Senator Talmadge); 120 Cong. Rec. 34737 (Oct. 9, 1974) (Representative Poage). When we couple this with Congress' recognition that jurisdiction over private causes of action had been held to have been conferred, the conclusion that Congress desired their continued recognition is nigh irresistible.

Appellees' primary answer to the foregoing discussion is that the pre-1974 cases upholding a private cause of action under the CEA were wrongly decided under the new trend in Supreme Court jurisprudence with respect to implication and that, in consequence, if Congress desired to preserve such a cause of action the savings clause was insufficient and nothing short of express statement would do. This argument might be somewhat impressive if we were dealing with legislation passed by Congress today. But the law here before us was enacted on October 23, 1974 and "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the law was." *Brown* v. *G.S.A.*, 425 U.S. 820, 828-29 (1976), quoted

with approval by the majority in *Cannon* v. *University of Chicago, supra,* 441 U.S. at 710-11. Here not only did the 1974 Congress perceive the state of the law as allowing implied causes of action under the CEA but its perception was correct. As already developed, the related area of securities regulation was dominated by *J. I. Case Co.* v. *Borak, supra,* 377 U.S. 426, which was cited with approval, subsequent to the 1974 amendments, in *Cort* v. *Ash, supra,* 422 U.S. at 78, and was distinguished but in no way disapproved in *SIPC* v. *Barbour,* 421 U.S. 412, 423-24 (1975). While we of course follow the most recent pronouncements of the Supreme Court, those pronouncements focus our attention on the question of legislative intent, and "our evaluation of congressional action . . . must take into account its contemporary legal context." *Cannon, supra,* 441 U.S. at 698-99.

The sole decision preceding enactment of the 1974 amendments to which appellees point as evidencing the new trend is the *Amtrak* case, 414 U.S. 453, decided on January 9, 1974. Apart from the fact that *Amtrak* was decided when the amendments were well on the road to enactment and there is no evidence that those concerned with the amendments were aware of it, the decision would not in any event have been a warning flag to Congress to make its approval of a private right of action explicit. The clear language of the Amtrak Act and its legislative history manifested an intent to allow suit only by the Attorney General and affected employees, and not by others such as the plaintiff, a passenger association. The Secretary of Transportation had voiced this interpretation during the hearings and, as Justice Stewart reasoned, "it is surely most unlikely that the members of the Committee would have stood

mute if they had disagreed with it." *Id.* at 460. Here the sponsor of the bill in the House expressed his view, both when introducing the bill and in the House Report, that private actions *were* available under the CEA. It is "most unlikely" that the legislators considering the amendments "would have stood mute if they had disagreed with it."

Finally, Justice Stewart emphasized that allowing private suits would be inconsistent with the legislative purpose of the Amtrak Act, since Congress was deeply concerned with paring rail passenger routes efficiently and without time-consuming proceedings. *Id.* at 458. This would have been reason enough not to imply a private cause of action even under *Borak*, 377 U.S. at 432. See also *SIPC* v. *Barbour*, 421 U.S. 412, 418, 421 (1975) (*Amtrak* viewed as case where proposed right of action was inconsistent with legislative purpose). Here there is little dispute that the purposes of the CEA would be effectuated by private actions.

In light of this it is unnecessary to dwell on just how far the recent triad of *Cannon*, *Redington* and *Transamerica* may have gone in limiting the implied cause of action. We do think, however, that the rumors about the death of the implied cause of action which have been circulating in the wake of these decisions—an attitude strongly reflected in the dissent—are exaggerated, at least as far as previously enacted statutes are concerned, and that the effect of the decisions is simply to emphasize that the ultimate touchstone is congressional intent and not judicial notions of what would constitute wise policy. See *Zeffiro* v. *First Pennsylvania Banking and Trust Company* (3 Cir., May 29, 1980) (No. 79-2259) (injured debenture holder can bring implied cause of action under Trust Indenture Act

against indenture trustee who breaches agreement). Two of the decisions themselves recognized implied actions, *Cannon* under Title IX and *Transamerica* under § 215 of the Investment Advisers Act. *Cannon* is strong support for the result we have reached in this case, since the majority opinion recognized the earlier view on implying rights of action and expressly directed courts to consider Congressional action in light of this legal context. Both *Redington*, which found no implied right of action under § 17(a) of the 1934 Securities Exchange Act, and *Transamerica*, which found no implied action for damages under § 206 of the 1940 Investment Advisers Act, considered statutes which were enacted *prior* to the great explosion in judicial recognition of implied rights. Unlike the congressional action in 1974 involved in this case, or that in 1972 involved in *Cannon*, the congressional actions in 1934 and 1940 under review in *Redington* and *Transamerica* were not taken against a background of widespread judicial recognition of implied private causes of action for damages either as a general matter or with respect to the specific subject matter of those statutes. Further, the legislative history on private rights of action in both *Redington* and *Transamerica* was "entirely silent," 442 U.S. at 571-72; 62 L. Ed. 2d at 153—quite unlike the instant case. *Redington* involved a mere reporting provision, as to which there was no history of the implication of private causes of action and which was "flanked by provisions" expressly according such a right, and *Transamerica* turned largely on the express declaration that certain acts should make contracts void, which was taken to grant a right of rescission but not of damages, and the corresponding history of the jurisdictional clause of the Investment Advisers Act.

Far from foreclosing implication of private rights of action, *Transamerica* explicitly noted that the intent to provide such actions "may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Id.* at 154.

Even if we were to accept *arguendo* that the *Cannon-Redington-Transamerica* triad would call for affirmance if they had been rendered before the 1974 amendments to the CEA were enacted, the legislative history demonstrates beyond fair doubt that Congress relied on and approved the unanimous course of decisions recognizing private causes of action under the CEA, which in turn, were solidly based on the Supreme Court's decision in *Borak*. Even if that decision were now to be regarded as an aberration, see *Cannon, supra,* 441 U.S. at 735-36 (Powell, J., dissenting); *Redington, supra,* 442 U.S. at 576-77, this affords no basis for thinking that the 1974 Congress had any idea there would be such a drastic change in the Court's thinking.

Appellees also argue that the statutory provisions at issue cannot support a private cause of action because they merely proscribe certain conduct or prescribe duties, rather than explicitly creating rights (§§ 4a, 4b, 5(d), 5a(8)). It is true that the form in which Congress casts a statutory provision may serve as some indicator of the propriety of implication, see *Cannon, supra,* 441 U.S. at 690 n.13; *Transamerica, supra,* 62 L. Ed. 2d at 154, but this is by no means determinative. When, as here, the legislative history and the "circumstances of [a statute's] enactment" evince a clear intent to preserve a private cause of action, the form in which this intent is expressed cannot be permitted to become an obstacle to its realization. The cases do not purport to establish a linguistic test for implication and, in any event, the

securities cases are an exception to the right/duty dichotomy. *Cannon, supra,* 441 U.S. at 690-92 n.13. Even if Congress were aware of the perceived significance of this dichotomy in 1974, which it was not, there would have been no reason for it to suppose that the CEA would not fall under this same exception.

The same considerations refute the claim that a criminal provision such as § 9(b) cannot support a private cause of action. Prior to 1974 courts had implied a cause of action under this provision, see, e.g., *Deaktor, supra,* 479 F.2d at 534, and the Supreme Court had implied such actions from other penal provisions, see, e.g., *Borak, supra.* There was no reason for Congress in 1974 to suppose that this would not continue. In *Cort* v. *Ash, supra,* decided after passage of the 1974 amendments, Justice Brennan declined to imply a private cause of action in favor of a shareholder suing derivatively from a criminal statute prohibiting corporations from making certain specified political contributions. He was careful to note, however, that "provision of a criminal penalty does not necessarily *preclude* implication of a private cause of action for damages," and he refused to "go so far as to say that . . . a bare criminal statute can *never* be deemed sufficiently protective of some special group so as to give rise to a private cause of action by a member of that group." 422 U.S. at 79-80 (emphasis in original). He rested the decision on the basis that "the intent to protect corporate shareholders particularly was at best a subsidiary purpose of § 610, and the other relevant factors are all either not helpful or militate against implying a private cause of action." *Id.* In the case of the CEA we have found abundant evidence in the legislative history that the intent to protect traders in

commodity futures was the dominant purpose and the other relevant factors also militate in favor of implying the cause of action. Moreover, the CEA cannot be characterized as a "bare criminal statute". It is replete with civil remedies which involve the courts either directly or on review of CFTC action. See, e.g., § 6(b) (civil fines for, *inter alia,* manipulation); § 6b (cease and desist orders); § 6d (state actions for damages on behalf of residents); § 5b (suspension or revocation of contract market designation); § 14 (reparations). This is not at all a case where a court should be held back from implying a private cause of action because of a legitimate fear that Congress intended only criminal sanctions to apply to certain prohibited conduct.

As previously noted, see note 38, *supra,* appellees and the dissent also argue that no right of action should be implied because Congress did not enact proposals containing explicit rights of action which were before it. Indeed, the dissent repeatedly refers to one house or another of Congress having "rejected" amendments, when it merely failed to act upon them. The effect of such a failure is quite different from the voting down of an amendment, something that the word "rejection" inevitably calls to mind. A house of Congress may have failed to act on an amendment for any number of reasons other than opposition to it—belief that the point was already covered by existing law, see *Diamond Crystal Salt Co.* v. *P. J. Ritter Co.,* 419 F.2d 147, 148 (1 Cir. 1969); *Burlington Truck Lines* v. *Iowa Employment Security Comm'n,* 32 N.W.2d 792, 797 (Iowa 1949); objection to the particular terms and inertia in the way of correction, see note 38 *supra*; or just plain loss in the legislative shuffle. The language of *United States* v. *United Mine Workers,* 330 U.S. 258,

283 (1947), with regard to the failure of the House to enact a bill specifically providing for the injunctive relief there sought by the United States is peculiarly apt—"the fact that the House version did not provide for the issuance of injunctions to aid in the operation of seized plants is not the issue here. Rather it is whether the House expressed any intent to restrict the existing authority of the courts." See also *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-82 n.11 (1969) (". . . unsuccessful attempts at legislation are not the best guides to legislative intent").[39]

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39 We find little relevance in *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959), on which the dissent heavily relies. There Congress had deliberately withheld from the I.C.C. the power to award reparations for past unreasonable motor carrier rates, in sharp contrast to what it had done with regard to rail and water rates. The issue was whether a shipper could circumvent the congressional policy by suit in the courts, although the *Abilene* doctrine, 204 U.S. 426 (1907), would require the courts to refer the issue of reasonableness to the Commission. The Court concluded, although by the narrowest margin, that "It would be anomalous to hold that Congress intended that the sole effect of the omission of reparations provisions in the Motor Carrier Act would be to require the shipper to bring two lawsuits instead of one, with the parties required to file their complaint and answer in a court of competent jurisdiction and then immediately proceed to the I.C.C. to litigate what would ordinarily be the sole controversial issue in the suit", 359 U.S. at 474—although some commission cases and two district court cases which had given only "cursory attention" to the problem had held this might be done. Unlike the 1974 amendments to the CEA, there had been no comprehensive revision of the Motor Carrier Act after consistent judicial interpretation that it did permit reparations suits. The only communication of the Commission's views to Congress was in connection with a request that *it* be given reparations authority, on which Congress had not acted. In our case Congress deliberately left in place a series of eleven thoroughly considered decisions, in line with Supreme Court decisions in a closely related field, stretching out over seven years. Moreover, on the very point that concerned the Supreme Court in *T.I.M.E., Inc.*, namely, that the *Abilene* doctrine would involve the agency in an area where Congress had denied it power and thus circumvent congressional policy, there is no such conflict here. Indeed, the Supreme Court had ruled in *Deaktor* before the 1974 amendments were enacted that in a suit on

Although the Supreme Court has very recently warned in *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 48 L.W. 4658, 4662 (1980), quoting from *United States* v. *Price*, 361 U.S. 304, 313 (1960), which, in turn, was quoted in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348-49 (1963), that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," see also the discussion at 48 L.W. 4662 n.13, NYME, the opinion below and the dissent rely heavily on a 1978 amendment adding § 6d, which authorizes state officials to bring suits in federal courts to enjoin violations of the Act and to obtain monetary redress for their residents against violators other than exchanges. NYME asserts that the exception demonstrates a congressional desire that no private actions should exist against exchanges; the dissent takes broader grounds.

In fact, the evolution of § 6d actually supports rather than undermines the implication of a private cause of action against the exchanges. Section 6d was added during the reauthorization of the CFTC pursuant to the sunset provision in the 1974 amendments, 88 Stat. 1391. The period between 1974 and 1978 had seen the rise of widespread fraud off the regulated and supervised contract markets, particularly in the form of commodity options and leverage contracts. The CFTC was severely criticized for its failure to protect investors in this area, and the states were eager to take matters into their own hands and protect their residents. See generally Lower, *State Enforcement of*

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an implied cause of action under the CEA, the court should stay the action pending resort to the agency if this seemed desirable to preserve uniformity.

the Commodity Exchange Act, 27 Emory L. J. 1057 (1978); Young, *A Test of Federal Sunset: Congressional Reauthorization of the CFTC*, 27 Emory L. J. 853 (1978). Some had, see, e.g., *Kelley* v. *Carr*, *supra*, 442 F.Supp. 346 (W.D. Mich. 1977), but others were hamstrung by perceived limitations in the *parens patriae* doctrine. H. R. Rep. No. 95-1181, *supra*, at 14. The addition of § 6d was designed to remove these doubts and to enlist the prosecutorial and enforcement tools of the states to aid the CFTC in correcting abuses primarily off the contract markets. See *id.* at 15 (§ 6d "is intended, among other things, to provide the several states with the power . . . to protect their citizens from persons, such as London options firms, vendors of dealer options and merchants of so-called leverage contracts who perpetuate fraudulent and other practices made unlawful by the Federal law"). See also *Luna* v. *Merrill Lynch*, *supra*, note 1 at 6-8 n.24. Since this concern was largely with off-market abuses, contract markets, clearinghouses, and floor brokers were exempted from the coverage of § 6d. See S. Rep. No. 95-850, 95th Cong., 2d Sess. 25-26 (1978) (activities of these persons "generally of the character of 'pit trading' rather than customer contact"); 124 Cong. Rec. S10561 (July 12, 1978) (Remarks of Sen. Bellmon).

Indeed, the legislative history indicates that the perceived existence of an implied private cause of action against exchanges was actually one of the reasons for their exemption from § 6d. Explaining the exemption, Senator Leahy of the responsible committee noted that:

> The exemption from State suits provided to contract markets is justified due to the deterrent effect on contract markets caused by Commission

> regulation, institution of Commission enforcement proceedings, and *the implied private rights of action that may be brought against those contract markets that fail to discharge their duties under the Commodity Exchange Act.* 124 Cong. Rec. S16527 (Sept. 28, 1978) (emphasis supplied).

Since Congress explicitly relied on judicially implied rights of action in fashioning the exemption in § 6d, that exemption can hardly be cited as evidence of a desire to insulate exchanges from such actions. See also *Smith* v. *Groover, supra,* 468 F.Supp. at 117 ("We fail to see how an apparent congressional unwillingness to *extend* the liability of contract markets suggests an intention to *abolish* such liability altogether").[40]

This analysis is enough to answer NYME's major contention, namely, that the exemption of contract markets from the *parens patriae* actions newly authorized in 1978 is evidence that Congress did not mean them to be subject to private actions of any sort. The dissent adds two broader arguments. The first is that the 1978 amendment offered Congress an

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40 Requiring states to proceed in federal court and to notify the FCTC does not demonstrate that the 1978 Congress intended to eliminate the private suit for damages which had been recognized by its predecessors four years previously. The states were expected to act largely in an enforcement role, much as did the FCTC; moreover it would be incongruous to allow a state to proceed as *parens patriae* in its own courts for a violation of federal law. Sufficient means to obtain uniformity in private litigation were afforded by the controlling effect of federal law in all CEA litigation and the possibility of referral to the CFTC approved by the Supreme Court in *Deaktor.* Beyond this the dissent's reliance on such a slender reed as the inference to be drawn from the 1978 Congress' having required *parens patriae* suits to be brought in federal courts with prior notice to the CFTC is a prime example of the unreliability—frequently noted by the Supreme Court—of relying on the thinking of a later Congress as a guide to the intentions of a former one.

opportunity expressly to affirm the private right of action in the face of a few district court decisions that this no longer existed in the light of the 1974 legislation and what the dissent calls "the Supreme Court's recent but well-publicized adoption of somewhat stricter principles governing the implication of private causes of action." There are several answers. The first is that in 1978 Congress was concentrating on *parens patriae* suits; it was not considering a general revision of the CEA. "The logic of defendants' argument would be to require federal courts to prohibit private actions with respect to any statute amended in any way after the mid-1970's if Congress did not explicitly create a private right of action." *Navigator Group Funds, supra,* at 16. The second is that while Senator Huddleston cited two district court decisions which had denied a private right of action under the 1974 amendments, these were regarded as "unfortunate" and contrary to the many others he listed that had recognized the continued existence of such actions. 124 Cong. Rec. S. 10537 (July 12, 1978). Indeed the Senator expected additional causes of action to be recognized under other provisions of the CEA in the future, a view that hardly comports with fear of a new restrictive trend in implication jurisprudence. The third is that the asserted new trend in Supreme Court decisions had not yet begun, let alone been "well-publicized". *Cort,* which cited with approval both *Rigsby* and *Borak,* 422 U.S. at 78, merely disallowed a private cause of action in the case *sub judice.* It did not indicate any new trend, and the courts have not so regarded it. As Mr. Justice Powell noted in his *Cannon* dissent of 1979, 441 U.S. at 741, "In the four years since we decided *Cort,* no less than 20 decisions by the Courts of Appeals have

implied private actions from federal statutes." *Piper* v. *Chris-Craft Industries*, 430 U.S. 1 (1977), paid respectful attention to *Borak*, *supra*, 377 U.S. 426, as *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975) had also done, and to *Superintendent of Insurance*, *supra*, 404 U.S. 6. The issue decided adversely to the plaintiffs in these cases was not whether an implied cause of action existed generally but whether the particular plaintiffs came within the protected class. The other cases cited are even less to the point. The first indication of a changed attitude that could be detected by anyone reading the Court's opinions without an exceedingly high powered magnifying glass, not possessed even by the courts of appeals, much less by the Congress, was the 1979 opinion in *Cannon*—and there not in the decision, which was favorable to the plaintiff, but in footnote 6 to Mr. Justice Stevens' opinion, and especially in the dissenting opinion of Mr. Justice Powell.

The dissent argues finally that the express conferring of a right of action upon the states in 1978 shows that Congress thought such action to be necessary before any private cause of action could exist. The assertion is belied by the very passage from the House Report from which the dissent quotes. There was no history of recognition of causes of action by the states on behalf of their residents; indeed the very existence of *parens patriae* actions for other than a state's own financial loss had been called into most serious question by *Hawaii* v. *Standard Oil Co. of California*, 405 U.S. 151 (1972). The fact that only express legislation could overcome that decision does not at all suggest that Congress meant to destroy an implied cause of action by victims of proscribed practices which the courts had

upheld since 1967 and Congress had recognized in 1974.[41]

3. Our answer to the second question posed by *Cort* largely determines that to the third, "is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" Indeed, the question need hardly be asked in a case where, as we have found here, there is abundant evidence that Congress affirmatively intended the private remedy to continue. If Congress clearly thought the remedy to be consistent, it would be of no moment that a court should have doubts about this. Moreover, we have been pointed to nothing that would show how maintenance of suits such as these can impede the functioning of the CEA. If questions should arise in which a court would be aided by consideration by the CFTC, the procedure of a stay pending Commission consideration, which the Court directed in *Deaktor, supra,* 414 U.S. at 115, is available. The Commission sees no inconsistency. To the contrary, it tells us in its *amicus* brief (p. 15) that:

> private damage suits under the Act are consistent and may coexist with the forums expressly provided by Congress for the adjudication of complaints of futures traders—Commission reparation proceedings and contract market arbitration proceedings. The Commission has carefully harmonized these three rights that, in its view, have

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41 The list of CEA protections in the 1978 Senate Report, S. R. No. 95-980, *supra,* at 12-13, which the dissent, note 25, sees as indicative of a congressional belief that no private right of action existed, included only those protections *expressly* provided by the CEA, and is not at all inconsistent with the view, clearly held by the 1974 Congress, that other judicially *implied* protections existed. See *Navigator Group Funds, supra,* at 14-15.

> offered a commodity trader an election of remedies since 1974. (footnotes omitted).

The Commission also notes that it "is an agency with limited resources which are insufficient to permit it to police all commodity-related transactions" (p. 34), and that the private damage remedy, in the words of *Cannon*, "is necessary or at least helpful to the accomplishment of the statutory purpose," 441 U.S. at 703. Such expressions by the agency charged with the administration of the statute are entitled to substantial weight. *Cannon, supra*, 441 U.S. 706-08 & n.42.

4. Fortunately, little space needs to be devoted to the fourth *Cort* factor, "is the cause of action one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law?", 422 U.S. at 78. The answer is clearly in the negative. The federal government has been vitally concerned with trading in futures since 1922; indeed, the courts have held that § 2(a)(1) of the CEA preempts the application of state law. See *International Trading, Ltd.* v. *Bell*, 262 Ark. 244, 566 S.W.2d 420 (1977); Bromberg & Lowenfels, *supra*, at § 4.6 (471); Johnson, *supra*.

Having answered the first and third *Cort* questions in the affirmative and the fourth in the negative, and having found as to the second that there is ample evidence of legislative intent to preserve a private remedy, we conclude, in accordance with the Sixth Circuit's decision in *Curran* v. *Merrill Lynch*, see note 7 *supra*, that the district court was in error in holding that no private cause of action in damages for violation

of the CEA existed. Since the district court struck all the claims under the CEA, we need not now consider which claims, if any, were within the antifraud provision, § 4b, as distinguished from the antimanipulation provision, § 9(b), relied on as to all defendants; § 4a, relied on as to the conspirators and their brokers; and §§ 5(d) and 5a(8), relied on as to the NYME. Although the other provisions are fairly straightforward and clearly cover the activities alleged in the complaint, § 4b, to put it mildly, is not an easy provision to construe. Commentators have said of it that "While the intent to outlaw fraud is clear from the (A)-(C) subparagraphs, the syntactical mess which precedes them makes it difficult to answer some basic questions about coverage." Bromberg & Lowenfels, *supra*, § 452, at 82.286. Appellees are wrong in saying that § 4b by its terms only prohibits "any person" from defrauding "any other person" in connection with the making of a futures contract for or on behalf of that other person. Thus, if A defrauds broker B, who was making a futures contract for C, A would have defrauded C in connection with a futures contract made for C, although C is not A's customer.[42] The applicability of § 4b may well extend even further, since it could be argued that one trading for his own account makes a contract "for" himself, thus bringing fraud between two principals within the confused language of § 4b. The legislative history of the

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42 The plaintiffs in the consolidated actions before us include both persons who traded through agents, who would be within this example, and persons who traded directly for their own account. See *National Super Spuds, Inc.* v. *NYME*, 77 F.R.D. 361, 370 (S.D.N.Y. 1977). It is not clear in every case, however, which plaintiffs fall within which group.

provision contains some statements which indicate an intent to protect "customers", see H. R. Rep. No. 1522, 73d Cong., 2d Sess. 5 (1934), although this is never suggested as the limit of coverage, and other statements which suggest a broad construction, see H. R. Rep. No. 1551, 72d Cong., 1st Sess. 1 (1932); 80 Cong. Rec. 6162 (April 27, 1936) (Remarks of Sen. Pope); *id.* at 7853 (May 25, 1936); H. R. Rep. No. 743, 90th Cong., 1st Sess. 3 (1967); S. Rep. No. 947, 90th Cong., 2d Sess., reprinted in 2 U.S. Code Cong. & Admin. News 1673, 1678 (1968). When clarification of the section was suggested in 1974, Senator Clark read § 4b as an example of archaic language, but took it as "simply try[ing] to convey the idea that it is unlawful for any person to cheat or defraud another person." *Hearings on S. 2485, S. 2578, S. 2837, and H. R. 13113 Before the Senate Committee on Agriculture and Forestry, supra,* at 687 (Sen. Clark). Senator Clark was echoing the views of a predecessor considering the section when it was proposed: "[T]he object of the legislation is, or should be, to prevent deceptive or fraudulent transactions. Any language which accomplished that end is worthy of consideration." 80 Cong. Rec. 7871 (May 25, 1936) (Remarks of Sen. Robinson). None of the cases recognizing an implied right of action under § 4b suggest limitation to the broker-customer relation. Their reasoning is broader, and they frequently cite non-§ 4b cases such as *Deaktor.* In *Hirk* v. *Agri-Research Council, Inc., supra,* 561 F.2d at 104, the court suggested that, in line with *Superintendent of Insurance* v. *Bankers Life & Casualty Co., supra,* 404 U.S. at 12, the language of § 4b must be read "flexibly, not technically and restrictively." The dissent is thus seriously mistaken in assuming that § 4b will necessar-

ily be limited to cases coming within its crabbed language. We deem it inadvisable to rule on the applicability of § 4b without the benefit of evidence of the exact relations among the various parties; indeed plaintiffs may find it unnecessary to rely on this section. It is enough for present purposes that the CEA counts stricken from the complaints clearly charged a gross violation of the prohibition of manipulation, § 9(b), of the very type against which Congress had been legislating for half a century.

The order of the District Court is reversed.

MANSFIELD, *Circuit Judge* (Dissenting):

I respectfully dissent for the reason that the Commodity Exchange Act (Act), when analyzed according to well-settled principles of construction established by the Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975); *Cannon v. University of Chicago*, 441 U.S. 667 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 100 S. Ct. 242 (1979), fails completely to reveal any Congressional intent to approve, much less create, an implied private right of action in favor of these plaintiffs-appellants (1) against futures commission merchants and brokers (such as defendants Heinold Commodities Inc., Thompson & McKinnon, Auchincloss, Kohlmeyer Inc., and Clayton Brokerage Co. of St. Louis, Inc.), or (2) against contract exchanges (such as the New York Mercantile Exchange and its officers). On the contrary, Congress expressly provided a pervasive panoply of judicial and administrative means for enforcing compliance with the Act, including civil fines,

compensatory reparations, arbitration, cease and desist orders, and criminal penalties, which may reasonably be viewed as exclusive.

None of the sections of the Act relied upon by appellants (such as §§ 4b, 9(b), 5(d), 5a(8) of the Act, 7 U.S.C. §§ 6b, 13(b), 7(d), 7a(8)) contain any language even remotely suggesting that they were enacted for the "especial" benefit of a particular class of which plaintiffs are members, a primary factor to be considered in determining Congress' intent. *Cort v. Ash, supra,* 422 U.S. at 78. On the contrary, § 4b, of the Act, 7 U.S.C. § 6b, the anti-fraud provision heavily relied on by plaintiffs as supporting their claims against the broker defendants, indicates that it was enacted for the benefit of a discrete class of which plaintiffs are *not* members, namely, customers claiming fraud against brokers with whom they have a broker-customer relationship. Section 9(b) of the Act, 7 U.S.C. § 13(b), a criminal statute also relied on by plaintiffs, reveals that it was enacted for the benefit of the general public, which is insufficient to meet the requirement that a statute creating an implied remedy be for the benefit of a "special class." Section 5 of the Act, upon which plaintiffs rely as the basis for their claim against the New York Mercantile Exchange, is essentially a licensing statute which, among other things, obligates contract markets to comply with certain requirements, including the prevention of price manipulation. It neither grants private rights to members of any class, identifiable or otherwise, nor proscribes any conduct as unlawful.

The legislative history of the Act, which runs into hundreds of pages of Committee reports, testimony and debates, fails to contain one word approving a private

right of action, despite reference by a couple of witnesses and a senator to the subject. On the contrary, in 1974 Congress failed, after exhaustive hearings, to enact any one of several bills which would have expressly provided a private right of action for violations of the Act, S. 2837, 93d Cong., 2d Sess. § 505(a) (1974) (Hart bill) and S. 2378, § 16 (McGovern bill). In 1968 Congress had rejected a bill which would have made *contract markets* liable to aggrieved persons for violations of the Act, H.R. 9178, 90th Cong., 1st Sess. § 32 (1967). Moreover, the enactment of a reparations procedure whereby any person injured by a violation of the Act can recover compensatory damages, § 14, and its legislative history, shows not only that "Congress knew how to confer a private right of action when it wished to do so," *Transamerica, supra,* 100 S. Ct. at 248 n.13, but that Congress viewed the reparations procedure, along with the other expressly provided remedies, as sufficient to protect those aggrieved by violations of the Act. H.R. Rep. No. 975, 93d Cong., 2d Sess. 22, 83 (1974). In this respect the Act differs sharply from the Securities Exchange Act of 1934, 78 U.S.C. §§ 78, *et seq.*, relied upon by the majority, which does not provide for any administrative proceeding to recover damages.

Faced with this persuasive evidence against any intent to create or approve a private right of action, the majority relies on the fact that prior to the 1974 revision of the Act various lower federal courts, using the now-outmoded "tort theory" for implying a private right, had implied such rights under the Act as it then existed and contends that against this background (of which Congress is presumed by the majority to be aware) congressional silence in 1974 must be inter-

preted as congressional approval. I disagree. Congress is not under any duty to state that the various remedies provided by it are exclusive, much less to disavow or disassociate itself from prior lower court decisions as if they were statutes enacted by it. *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1958). The Supreme Court had never found implied rights under the Act. Virtually all of the lower federal court decisions, moreover, are irrelevant for the reason that they deal with rights of *customers* against their broker-dealers under § 4b, 7 U.S.C. § 6b, not suits by speculators such as plaintiffs against brokers with whom they have no relationship.

Only one pre-1974 decision, *Deaktor v. L.D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *reversed on other grounds sub nom., Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973), decided less than one year before the 1974 revision of the Act, implied a private right in favor of a trader against an exchange. Neither this nor any other of the pre-1974 decisions relied on by the majority was ever cited to or discussed by Congress.[1] To presume under these circumstances that Congress was aware of and approved these prior cases is to substitute sheer speculation for hard evidence of intent.

In addition the majority errs in my view by presuming that Congress assumed that a private right

1 Although the Department of Justice in a letter to the House Committee, dated January 30, 1974, H.R. Rep. 93-975, *supra*, at 25, 26, briefly cited the Supreme Court's decision in *Deaktor*, the Department cited the case not for the proposition that private rights of action exist under the Act—indeed the Supreme Court's decision did not even address private rights of action—but rather for the totally different purpose of persuading Congress not to enact a blanket antitrust exemption for the exchanges. There is nothing in the legislative history suggesting that Congress was aware that the lower court in *Deaktor* had implied a private right of action under the Act.

may be implied in the absence of a Congressional statement of the opposite intent. On the contrary, the burden is on appellants to show an affirmative Congressional intent to favor an implied private right. Lacking any affirmative evidence of such approval, either on the face of the Act or in its legislative history, plaintiffs have failed to sustain that burden.

PRINCIPLES OF STATUTORY CONSTRUCTION TO BE APPLIED IN DETERMINING WHETHER IMPLIED PRIVATE RIGHT OF ACTION EXISTS

As the Supreme Court has recently made clear, *Transamerica, supra,* 100 S. Ct. at 245; *Redington, supra,* 442 U.S. at 568; *Cannon, supra,* 441 U.S. at 688, the question of whether a statute impliedly creates a private right of action is one of statutory construction requiring us to determine whether the plaintiff has sustained the burden of showing that Congress had an unexpressed intent in favor of such a remedy. See *Securities Investor Protection Corp. v. Barbour,* 421 U.S. 412, 419 (1975); *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U.S. 453, 458 (1974) (hereinafter *Amtrak*); *Colonial Realty Corp. v. Bache & Co.,* 358 F.2d 178, 182 (1966), *cert. denied,* 385 U.S. 317 (1966) (Friendly, C.J.). Absent evidence of clear intent, judicial creation of a private remedy amounts to an assumption or usurpation of the legislative function in violation of the separation of powers doctrine. *Cannon, supra,* 441 U.S. 743-47 (Powell, J., dissenting).

In construing a statute to ascertain Congress' intent "the court is to apply the law in effect at the time it renders its decision, unless doing so would result in

manifest injustice or there is statutory direction or legislative history to the contrary," *Cort v. Ash, supra,* 422 U.S. at 77 (quoting from *Bradley v. Richmond School Board,* 416 U.S. 696, 711 (1974)). Although the utility of a private remedy in achieving the apparent goal of legislation is a factor to be considered in seeking to divine Congress' intent and was at one time the dominant factor, e.g., *J.I. Case Co. v. Borak,* 377 U.S. 426, 436 (1964), it has been relegated to a lesser position by a series of decisions beginning with *Cort v. Ash, supra.* We are now instructed to look principally to the language and structure of the statute at issue in light of the circumstances surrounding its enactment rather than engage in judicial legislation supported only by our own view that a private suit would be a salutary enforcement weapon. As Mr. Justice Frankfurter has reminded us, "We must be wary against interpolating our notions of policy in the interstices of legislative provisions," *Scripps-Howard Radio v. FCC,* 316 U.S. 4, 11 (1942).

> "As our recent cases—particularly *Cort v. Ash,* 422 U.S. 66—demonstrate, the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person. Instead, before concluding that Congress intended to make a remedy available to a special class of litigants, a court must carefully analyze the four factors that *Cort* identifies as indicative of such an intent." [Footnote omitted.] *Cannon, supra,* 441 U.S. at 688.

* * * * *

> "While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, *e.g., J.I. Case Co. v. Borak, supra,* what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear. *Touche Ross & Co. v. Redington, supra,* at [568]; *Cannon v. University of Chicago, supra,* at [688]. We accept this as the appropriate inquiry to be made in resolving the issues presented by the case before us." *Transamerica, supra,* 100 S. Ct. at 245.

If the language and structure of the statute clearly demonstrate Congress' intent, we need go no further. If not, we must attempt to fathom Congress' intent by applying the factors set forth in *Cort v. Ash.* The first of these is whether the statute indicates that it was enacted for the "especial" benefit of a particular identifiable class of which the plaintiff is a member. We may not, however, infer an intent to create a private remedy merely from Congress' expressed desire to benefit the public generally or even to benefit everyone engaged in an entire industry or line of commerce. As the Court stated in *Cannon, supra,* 441 U.S. at 690:

> "The language in these statutes—which expressly identified the class Congress intended to benefit—contrasts sharply with statutory language customarily found in criminal statutes, such as that construed in *Cort, supra,* and other laws enacted for the protection of the general public.[13]"

Footnote 13 reads in relevant part:

> "Conversely, the Court has been especially reluctant to imply causes of actions under statutes that create duties on the part of persons for the benefit of the public at large. See *Piper v. Chris-Craft Industries,* 430 U.S. 1 ('unlawful' conduct); *Cort v. Ash, supra* ('unlawful' conduct); *Securities Investor Protection Corp. v. Barbour,* 421 U.S. 412 (duty of SIPC to 'discharge obligations'); *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers,* 414 U.S. 453 (forbidding 'action, practice, or policy inconsistent' with the Amtrak Act); *Wheedlin v. Wheeler,* 373 U.S. 647 (setting procedure for procuring congressional subpoena); *T.I.M.E. Inc. v. United States,* 357 U.S. 464 ('duty of every common carrier . . . to establish . . . just and reasonable rates . . . .'); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U.S. 246 (similar duty of gas pipeline companies)."

The term "especial" benefit refers to a specific, definable class, described by the Court in *Cannon* as "a special class of which the plaintiff is a member," 441 U.S. at 689. The broader that class, the weaker is any implication of intent to provide its members with a private remedy. Otherwise the "special class" would embrace everyone.

Thus, we must carefully search the language of the statutory provisions under consideration for any expression of intent to benefit a specific group, as distinguished from an intent to benefit an entire industry, line of commerce or the public at large. Absent such expression, the possibility that Congress

intended to provide a private remedy is so slim as to be virtually non-existent.

Assuming that the statute on its face evidences a desire to benefit a special class of which plaintiff is a member, we must next examine the statute as a whole and such relevant circumstances surrounding its enactment as may shed light on Congress' intent with respect to remedies. An important consideration in this search is whether and to what extent that statute expressly provides remedies other than a private right of action for its enforcement. The failure to provide any remedies is obviously not helpful to a private plaintiff, since "implying a private right on the basis of congressional silence is a hazardous enterprise, at best," *Redington, supra*, 442 U.S. at 571. But this is not dispositive, since "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make a private remedy available," *Transamerica, supra*, 100 S. Ct. at 246. On the other hand, if the statute *does* contain other provisions for its enforcement, such as judicial or administrative remedies, which would secure most if not all of the relief sought in the private action, a private remedy will not ordinarily be implied. The Court has recently reiterated the principle of statutory construction in *Kissinger v. Reporters Committee for Freedom of the Press*, 48 U.S.L.W. 4223, 4226 (March 4, 1980), and in *Transamerica, supra*.

> "Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. 'When a statute limits a thing to be done in a particular

> mode, it includes the negative of any other mode.' *Botany Mills v. United States*, 278 U.S. 282, 289 (1929). See *Amtrak*, *supra*, 414 U.S. at 458; *Securities Protection Investment Corp. v. Barbour*, 421 U.S. 412, 419; *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 471." *Transamerica*, *supra*, 100 S. Ct. at 247.

It is reasonably clear that the broader the scope and type of the expressly-provided remedies, the less is the need or justification for implying an unmentioned additional private remedy. In such circumstances it is highly unlikely that "Congress absentmindedly forgot to mention an intended private action." *Transamerica*, *supra*, 100 S. Ct. at 247 (quoting *Cannon*, *supra*, 441 U.S. at 742).

Next in our search for legislative intent we look to the legislative history of the statute. The most reliable and persuasive indicia of congressional intent, of course, are Senate and House Committee Reports. *United States v. International Union (UAW-CIO)*, 352 U.S. 567, 585-86 (1957); *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); *International Tel. & Tel. Corp. v. General Tel. and Electronics Corp.*, 518 F.2d 913, 921 (9th Cir. 1975); *American Airlines, Inc. v. CAB*, 365 F.2d 939, 949 (D.C. 1966).

Absent definitive statements on the issue of private remedy by those solons vested with primary responsibility for the statute, certain surrounding relevant circumstances may shed light on Congress' intent as to remedies, such as its consideration and/or rejection of an express private remedy, its statements of understanding as to the necessity or lack of it for such a

provision, whether an implied remedy is consistent with the statute's underlying purposes and with any other enforcement measures expressly provided by it, and whether the private remedy is one traditionally relegated to other tribunals, such as administrative bodies or state courts. Most of these other circumstances, however, while of some relevance, usually offer but a weak reed upon which to rest a determination of Congress' intent. There comes a point where legislative history becomes so will-o'-the-wisp or far-fetched with respect to the matter in issue that we run the danger of attributing to Congress thoughts it never actually had. "The search for significance in the silence of Congress is too often the pursuit of a mirage," *Scripps-Howard Radio v. FCC, supra*, 316 U.S. at 11. This ethereal process is particularly illusory, stultifying and unrealistic where, as here, we may reasonably expect, because the issue of a private damage remedy is so important that, had Congress approved or acquiesced in a private right of action, it would have said so somewhere in the thousands of pages of legislative history on the Act.

For these reasons, where it is claimed that Congress has created the significant and potentially devastating remedy of a private action for damages, under which liability could amount to hundreds of millions of dollars, primary weight should be placed on the language of the statute and on clear, unequivocal statements by those responsible for its enactment. As the Supreme Court has recently emphasized, "absent a clearly expressed legislative intention to the contrary," the plain language of a statute "must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 48 U.S.L.W. 4658, 4659 (June 9, 1980). Extrapolations based on gossamer-

thin fabric, requiring speculative assumptions as to Congress' intent are to be avoided. To rely upon such weak inferences is to indulge in judicial legislation. If, as the majority states (footnote 17) was the case with the 1974 amendments to the Commodity Exchange Act, Congress makes a *"complete overhaul"* of a statute, expressly creating other remedies, it is reasonable to expect that it will indicate any intent to create such an important right as that to bring a private suit by an express grant, which would take but one sentence, rather than by silence.

A GENERAL OVERVIEW OF THE COMMODITIES EXCHANGE ACT

Before turning to the specific language of the Commodity Exchange Act, 7 U.S.C. §§ 1, *et seq.*, relied upon by appellants as the basis for their claim of implied private rights of action against (1) future commission merchants and brokers, §§ 4b, 9(b), 7 U.S.C. §§ 6b, 13(b), and (2) exchanges or contract markets, §§ 5(d), 5a(8), 7 U.S.C. §§ 7(d), 7a(8), a brief overview of the Act is helpful. Trading in commodity futures has dramatically increased over the last half-century, giving rise to problems of public importance, such as the dangers of price manipulation, cornering of markets and fraud by broker-dealers upon their customers. As these problems increased, more stringent public supervision and control of markets and brokers became necessary. From 1922, when Congress enacted the Grain Futures Act to give the Secretary of Agriculture supervisory power over grain exchanges, until 1974, when the Commodity Futures Trading Commission Act was enacted, creating a new indepen-

dent agency, the Commodity Futures Trading Commission (CFTC) with plenary and exclusive authority over both futures markets and traders on those markets. Congress has gradually increased public control to the point where we now have an elaborate regulatory scheme designed to assure the public of honest and orderly futures trading, and to prevent price manipulation, fraud and sudden or unreasonable price fluctuations in commodity prices.

This extensive all-embracing system was described by House and Senate Reports as intended to create a "uniform," "comprehensive," "complete" and "coherent" regulatory structure. H.R. Rep. No. 93-975, *supra*, at 1; S. Rep. No. 850, 95th Cong., 2d Sess. 10, 13 (1978). The Act authorizes a wide variety of control mechanisms, including the licensing of contract exchanges and trading personnel, and a full panoply of enforcement powers, both administrative and judicial, including procedures for the award of damages in reparations proceedings, arbitration, imposition of civil fines of up to $100,000 for violations, issuance of cease and desist orders with fines of up to $100,000 per day for noncompliance, conduct of investigations with power to compel attendance of witnesses and production of documents, revocation of an exchange's designation, suspension of members of exchanges from trading privileges, institution of proceedings in federal court to compel compliance with orders or to enjoin violations of the Act, and the assessment of criminal penalties for violations of the Act and price manipulation, felonies punishable by a fine of not more than $500,000 or imprisonment up to five years, or both.

Provisions for Regulation of Contract Exchanges

Under the Act the CFTC is vested with exclusive power to designate contract exchanges for trading in particular commodities, § 5 of Act, 7 U.S.C. § 7. Futures contracts may lawfully be traded only on such "contract markets" as are designated for the commodity traded, §§ 4 and 4h of the Act, 7 U.S.C. § 6 and 6h. In order to be so designated as a contract market and to continue to conduct business as such, an exchange must meet rigid requirements, including the adoption of procedures for the prevention of price manipulation. § 5(d) of the Act, 7 U.S.C. § 7(d). Section 5a of the Act places additional requirements on a contract market, including the requirement that it enforce all of its rules that have been approved by the CFTC. § 5a(8) of the Act, 7 U.S.C. § 7a(8). The CFTC may disapprove rules violative of the Act or of its regulations and compel exchanges to adopt additional rules, § 8a(7) of Act, 7 U.S.C. § 12a(7).

If a contract market violates the Act or the conditions of its designation the CFTC is empowered to suspend or revoke its designation, § 5b, § 6(a) of Act, 7 U.S.C. § 7b, § 8. In addition it may conduct such investigations as it deems necessary to ascertain the facts, § 8 of Act, 7 U.S.C. § 12(a), issuing such compulsory process as is needed for production of witnesses and documents, § 6(b) of Act, 7 U.S.C. § 15. The CFTC is authorized to issue its own cease and desist orders against exchanges found after hearing to be violating the Act or any regulations thereunder, and assess civil penalties of up to $100,000 for each violation, § 6b of Act, 7 U.S.C. § 13a. Refusal to comply with a CFTC cease and desist order is a misdemeanor punishable by fine of up to

$100,000 or imprisonment of not less than 6 months nor more than one year, or both, for each day of noncompliance. *Id.* The CFTC may seek federal relief against violation of the Act or regulations by anyone, including an injunction or restraining order to stop existing or threatened violations or a writ of mandamus compelling an exchange to comply. § 6c of Act, 7 U.S.C. § 13a-1. It may also direct contract markets to take emergency action to maintain an orderly market. § 8a(9) of the Act, 7 U.S.C. § 12a(9). Exchanges are also subject to criminal penalties for violations of the Act or price manipulation, felonies punishable by a maximum fine of $500,000 and prison term of 5 years. § 9(b) of Act, 7 U.S.C. § 13(b).

Provisions for Regulation of Futures Commission Merchants

The CFTC has equally awesome and pervasive powers over brokers and futures commission merchants (FCMs). It establishes requirements for registration of brokers as futures commission merchants, §§ 4d, 4f, 4g, 4k, 4p, 8a, of Act, 7 U.S.C. §§ 6d, 6f, 6g, 6k, 6p, 12a. Two substantive provisions of the Act are particularly relevant here. Section 4a authorizes the CFTC to fix quantitative limits on speculative trading, 7 U.S.C. § 6a, and by regulation the CFTC has fixed limits on short trading. 17 C.F.R. § 150.10. Section 4b prohibits any members of any exchange from defrauding his customer in connection with a sale. 7 U.S.C. § 6b.

The CFTC is authorized to deny trading privileges to any person violating the Act or attempting to manipulate commodity prices and may suspend or revoke the registration of a futures commission

merchant for violations. § 6(b) of Act, 7 U.S.C. § 9. It may also suspend, expel or otherwise discipline any exchange member or deny him access to the exchange, § 8c(1) of Act, 7 U.S.C. § 12c(1), including aiders and abettors, § 13 of Act, 7 U.S.C. § 13c, and review, affirm, reverse or modify an exchange's discipline of its own members, § 8c(3) of Act, 7 U.S.C. § 12c(3). Violations of the Act and commodity price manipulation are felonies punishable by a maximum term of up to 5 years imprisonment or a fine of not more than $500,000, § 9(b) of Act, 7 U.S.C. § 13(b). In addition, the CFTC may issue cease and desist orders against a broker engaged in or attempting price manipulation, § 6(c) of Act, 7 U.S.C. § 13b. Non-compliance constitutes a misdemeanor punishable by a fine of up to $100,000, imprisonment of not less than 6 months nor more than 1 year, or both, for each day of refusal to obey. *Id.* The CFTC may also, as with exchanges, seek mandamus and injunctive relief in the federal courts, § 6c of Act, 7 U.S.C. § 13a-1.

Provisions for Compensation of Persons Injured by Violations

The Act also provides detailed procedures designed to compensate persons damaged by violations of the Act. Contract markets are required to provide voluntary arbitration procedures for settlement of customers' complaints up to $15,000 against any member or employee, § 5a(11) of Act, 7 U.S.C. § 7a(11). This, of course, contemplates a swift, inexpensive method of resolving smaller claims.

A much more comprehensive and complete compensatory remedy available to those with large claims is

provided by § 14 of the Act, 7 U.S.C. § 18. Section 14 provides for the institution of an administrative "reparations" proceeding by "any person" (which includes plaintiffs here) against any person registered under §§ 6d, 6e, 6j and 6m of the Act, including a futures commission merchant, for damages caused by a violation of any provision of the Act or any rule, regulation or order thereunder. The CFTC is required first to review the facts set forth in the petition and, if it believes these warrant action, it must forward a copy of the complaint to the respondent for satisfaction or response. If the CFTC after hearing finds that the registered merchant or broker has violated the Act it must determine the amount of the damage and order the offender to pay the amount to the complainant. If its order is not satisfied the CFTC may seek enforcement in the federal district court where the complainant resides, which is expressly empowered to issue orders, writs and process anywhere in the United States. The respondent against whom the Commission has issued a reparations order may obtain review by a United States Court of Appeals upon posting of a bond in double the amount of the reparations awarded.

Unless the registrant against whom a CFTC reparations order has been issued shows within 15 days thereafter that he has satisfied the order or taken an appeal to a federal court of appeals, which is authorized to review the order, the Commission must prohibit him from trading on all contract markets and his registration is automatically suspended, § 18(f), 7 U.S.C. § 14(f). The Act thus provides an efficient and inexpensive method whereby any injured person may obtain compensatory damages in an unlimited amount against a broker for violations of the Act, thus avoiding

much of the expense and delay involved in costly court actions, which necessitate extended use of scarce judicial resources.

Applicability to the Present Case

The complaints in the present action, to the extent that they seek relief based on violations of the Act against the three broker-defendants registered as futures commission merchants with the CFTC (Heinold Commodities Inc., Clayton Brokerage Co. of St. Louis, Inc., and Thompson & McKinnon, Auchincloss, Kohlmeyer, Inc.) pursuant to § 4d of the Act, 7 U.S.C. § 6d, are completely remediable under the express provisions of the Act itself. In addition the CFTC may conduct, and as to some short sellers and agents of certain brokers in this case has conducted, investigations leading to imposition of sanctions, including heavy fines and prohibitions against trading on a designated contract markets.[2]

To the extent that appellants seek relief against the designated contract exchange defendants (New York Mercantile Exchange and its officers) based on violations of the Act, the reparations procedure provided by § 14 of the Act is not made available. This omission,

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2 As a result of the CFTC investigation, Simplot and his various companies entered a consent decree pursuant to which they were assessed a fine of $90,000, and prohibited from trading futures contracts for six years. Similarly, Taggares and his companies entered into a consent decree pursuant to which they were assessed a fine of $15,000 and prohibited from trading futures contracts for four years. CFTC investigations against various long traders and certain agents of brokers are still pending. Although the CFTC has not conducted an investigation of the defendant brokers here, the Clearing House Committee of the Exchange assessed heavy penalties against defendant Clayton for its failure to comply with Exchange Rule § 44.02, which requires members of the exchange who are not in a position to make delivery of a commodity to enter a liquidating order not later than five minutes before the closing of trading.

however, does not appear to have been an oversight, but rather a move deliberately designed to protect exchanges against ruinous damage recoveries which might seriously weaken them or drive them out of business. The existing administrative remedies, including the broad disciplinary action that the CFTC was authorized to employ, coupled with its power under § 6b to impose a fine of up to $100,000 on an exchange for each offense, were sufficient to remedy noncompliance by an exchange with the Act's stringent requirements.[3]

Thus the Act, far from being silent on the subject of remedies for its enforcement, provides a series of specific remedies, including administrative reparations in prescribed circumstances, enforceable through and reviewable by federal courts. This tends to negate the inference that Congress intended implied private rights of action to exist after its complete overhaul of the Act in 1974 and simply forgot to mention this remedy. The structure of the Act itself, therefore, affords no assistance to the plaintiffs but on the contrary supports the dismissal of their claims.[4]

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3 Here the CFTC administrative proceeding against the New York Mercantile Exchange resulted in a consent decree and a $50,000 civil penalty.

As for defendants Simplot and Taggares, the majority claims (opinion, p. 49) that it is "unimaginable" that Congress could have intended to relieve such defendants from large civil liability. The majority misses the point. Whether a private right of action exists against such purchaser-speculators as Simplot and Taggares is not at issue in this case. More significantly, it escapes me how the majority can claim that we are somehow "withdrawing" a pre-existing private right of action against defendants like Simplot and Taggares, in light of the fact that *no case* has ever held that a private right of action exists in favor of one speculator against a purchaser-speculator. There is simply no remedy for us to "withdraw."

4 As administrative agencies for obvious reasons are wont to do, the CFTC here contends that the implication of private rights of action

THE SPECIFIC PROVISIONS OF THE ACT RELIED UPON BY THE APPELLANTS

(1) *Sections relied on to support claims against the registered futures commission merchants.* (§ 4b, 9(b), 7 U.S.C. §§ 6b, 13 (b))

The plain language of § 4b, 7 U.S.C. § 6b, upon which plaintiffs mainly rely as authority for their private action against the broker-defendants, shows that it does not refer to the obligations of broker-dealers toward third parties, such as the plaintiffs here, but to their obligations toward their own customers. Plaintiffs, who

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is necessary to effectuate the purposes of the statute and claims that its views on the matter are entitled to considerable deference. The Supreme Court, however, has consistently rejected such claims. In *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 41 n.27 (1976), the Court stated with respect to the SEC's position on the need for private rights of action that the SEC's "presumed 'expertise' in the securities law field is of limited value when the narrow legal issue is one peculiarly reserved for judicial resolution, namely whether a cause of action should be implied by judicial interpretation in favor of a particular class of litigants. Indeed, in our prior cases relating to implied causes of action, the Court has understandably not invoked the 'administrative deference' rule, even when the SEC supported the result reached in the particular case. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971)."

Moreover, the Supreme Court has significantly rejected the implication of a private right of action, despite the urgings of the relevant administrative agency, in such cases as *Transamerica, supra*, 100 S. Ct. 242; *Redington, supra*, 422 U.S. 560; *Piper, supra*; *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 738 (1974); *T.I.M.E. Inc. v. United States, supra*, 359 U.S. 464. Although an agency's interpretation of the statute under which it operates is entitled to some deference, "this deference is constrained by our obligation to honor the clear meaning of the statute, as revealed by its language, purpose and history." *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979) (quoting *Teamsters v. Daniel*, 439 U.S. 551, 556 n.20 (1979)).

are speculators in the futures market, are not claiming fraud on the part of broker-dealers who handled their accounts but fraud on the part of other brokers with whom they had no relationship who allegedly participated in a conspiracy with short sellers and others to artificially depress the price of May 1976 potato futures through manipulation and excessive short sales in violation of the Act.

Section 4b reads in pertinent part:

> *"It shall be unlawful (1) for any member of a contract market* . . . in or in connection with *any order* . . . *for or on behalf of any other person,* or (2) *for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery* . . . *for or on behalf of any other person*. . . .
>
> (A) to cheat or defraud or attempt to cheat or defraud *such other person;*
>
> (B) willfully to make or cause to be made to *such other person* any false report or statement thereof, or willfully to enter or cause to be entered for *such person* any false record thereof;
>
> (C) willfully to deceive or attempt to deceive *such other person* by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for *such person."* (Emphasis added.)

Only the person on whose "behalf" a contract is made by a member is protected by § 4b from the fraud and deceit on the part of that member in the making of a

futures contract. The "person" is the customer for whom the futures contract is made. The introductory paragraph defines the subject matter of the action in terms of a "contract of sale . . . for or on behalf of any other person." Subsections (A), (B) and (C) then limit the prohibited activities to certain forms of fraud by the broker upon "such other person" (i.e., his customer). The offense, therefore, exists only when a member cheats or defrauds *his own customer.*

Nowhere does § 4b mention parties having no connection to the contract. Nor, despite the majority's effort to strain a broader coverage out of the section's language, is there any indication that Congress intended to create the massive liability that would result if broker-dealers were made liable to every trader active in the market at a given time. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733 n.5 (1975) ("The wording of § 10(b), making fraud *in connection with the purchase or sale of a security* a violation of the Act, is surely badly strained when construed to provide a cause of action, not to purchasers and sellers of securities, but to the world at large" (emphasis in original)). The express mention of customers only as beneficiaries, just like the mention of purchasers and sellers in *Blue Chip Stamps*, negates any intent to include anyone else.

There is no support in the legislative history for the majority's broad reading of § 4b. To the contrary, language in relevant House Reports indicates just the opposite. The 1934 House Report on what was to become § 4b states:

> "Section 4b prohibits traders in acting *for customers in futures transactions to cheat, defraud, or deceive customers*, or to bucket or offset such

> orders against orders for others." H. R. Rep. No. 1637, 73d Cong., 2d Sess. 5 (1934). (Emphasis added).

The 1935 House Report confirms that interpretation:

> "Section 4b makes it unlawful for members of contract markets, and correspondents, agents, and employees thereof, in connection with orders to make or the making of contracts of sale of any commodity in interstate commerce to cheat, defraud, or deceive *the customer*, or to bucket the order." H. R. Rep. No. 421, 74th Cong., 1st Sess. 5 (1935). (Emphasis added).

The legislative history of the 1968 amendments also refutes the majority's contention. Speaking in support of legislation to amend § 4b, Representative Hathaway introduced the testimony of Assistant Secretary of Agriculture Mehrens, who had testified before the House Committee on Agriculture, stating in part: "We ask that this provision [§ 4b] be expanded to cover all persons who handle *customer* orders or funds. . . . The proposed legislation . . . would . . . give *customers* who deal in commodity futures with nonmembers the full protection of the Act." 113 Cong. Rec. 23651 (Aug. 22, 1967). See S. Rep. No. 947, 90th Cong., 2d Sess. 6 (1968). There was no indication that non-customers, such as plaintiffs here, were entitled to invoke the section against third parties who were not their brokers or fiduciaries. See in accord, *Chipser v. Kohmeryer & Co.*, 600 F.2d 1061, 1065 (5th Cir. 1979) ("Section 4b makes it unlawful for a commodities broker to 'cheat or defraud' a *customer* or willfully deceive or make false statements or reports to a *customer* in connection with

transactions on the commodities exchange." (Emphasis added)).

Aside from the fact that § 4b is limited to protection of customers against fraud on the part of broker-dealers acting on their behalf, there is nothing in the section indicating that Congress intended to provide even these customers, much less others such as appellants, with a private civil remedy against broker-dealers. The Supreme Court has repeatedly stated that before a private right of action will be implied it must be shown to be "necessary" to effectuate Congress' purpose. *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979) (private right of action not necessary since plaintiffs had an alternative remedy); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 41 (1977); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477 (1977). Here a private remedy would not be necessary to enforcement of § 4b, since the existing administrative procedures provided by the Act, including the award of reparations, amply protect the customer. The creation of an implied private judicial remedy would not only be unnecessary but would run counter to Congress' established remedies, since the customer could hardly seek damages in a civil court action without waiving his right to recover the same damages in a reparations proceeding. A private right would therefore be duplicative.

Nor does the language of § 9(b) of the Act, 7 U.S.C. § 13(b),[5] the other section of the Act relied on by

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5 Section 9(b) reads:

"(b) It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner

plaintiffs, sustain a private right of action here. It is a criminal statute to be enforced by criminal penalties, as was specifically recognized by Congress when it amended the provision in 1936. H.R. Rep. No. 421, 74th Cong., 2d Sess. 9 (1935). There is no language in § 9(b) even remotely suggesting that it was enacted for the "especial" benefit of a special class of which plantiffs are members. Indeed, the statute makes no reference to any beneficiaries at all. Like § 206 of the Investment Advisors Act construed in *Transamerica, supra,* it "simply proscribes certain conduct, and does not in terms create or alter any civil liabilities." 100 S. Ct. at 247. To spell a private right of action out of such a general criminal statute would permit anyone who claimed to have been injured by a violation of the Act to sue, regardless of Congress' intent. The Supreme Court "has been especially reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large," *Cannon, supra,* 441 U.S. at 692 n.13; *Cort v. Ash, supra,* 422 U.S. at 79-80 (18 U.S.C. § 610, prohibiting corporate contributions), and it has rarely implied a cause of

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any such commodity, or knowingly to delivery or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, or knowingly to violate the provisions of section 6, 6b, 6c(b) through 6c(e), 6h, 6o(1), or 23 of this title, or knowingly to make any false or misleading statement of a material fact in any registration application or report filed with the Commission, or knowingly to omit in any application or report any material fact that is required to be stated therein. Notwithstanding the foregoing, in the case of any violation described in the foregoing sentence by a person who is an individual, the fine shall not be more than $100,000, together with the costs of prosecution."

action under a criminal statute. *Chrysler Corp. v. Brown, supra,* 441 U.S. at 316. Despite the majority's protestations, this is not one of those rare cases.

Nowhere else in the language or structure of the Commodity Exchange Act can one find any express or implied intent to benefit a special class, much less commodity speculators such as plaintiffs here. The reason is that the Act was not enacted for the "especial" benefit of any particular class but to protect the public and primarily producers and customers, against wide, sudden or unexplained fluctuations in the prices of commodities, which could ruin producers and cause serious hardship to consumers, processors, merchandisers, millers, dealers, and shippers. This was made clear by Congress in its declaration of purposes and policies underlying the Act, found in § 3 of the Act, 7 U.S.C. § 5, which has remained virtually unchanged since its enactment in 1922. Section 3 provides:

> "Transactions in . . . 'futures' are affected with a national public interest; . . . the prices involved in such transactions are generally quoted and disseminated . . . as a basis for determining the prices to the producer and the consumer of commodities and the products and byproducts thereof and to facilitate the movements thereof in interstate commerce; such transactions are utilized by shippers, dealers, millers, and others engaged in handling commodities and the products and byproducts thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; the transactions and prices of commodities on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in

> the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling commodities and products and byproducts thereof in interstate commerce and such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodities and the products and byproducts thereof and render regulation imperative for the protection of such commerce and the national public interest therein."

Congress' solicitude was recently summarized by testimony in 1974 of the Administrator of the Commodity Exchange Authority (the predecessor of CFTC), Alex Caldwell, before the Senate Committee considering proposed amendments to the Act:

> "Originally back in 1922 it was the feeling of Congress that the Commodity Exchange Act was designed to protect producers. It is now recognized that it is not designed only to protect producers, but also the merchandisers and processors and ultimately the consumers." Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Committee on Agriculture and Forestry, 93d Cong., 2d Sess. at 234 (1974).

The congressional debate on the 1974 amendments amply confirms that the Act was not designed for the *especial* benefit of speculators. Representative Mayne, a member of the Committee on Agriculture, for example, stated "The purpose of the legislation before us today can best be described as a means for providing the fairest possible market for legitimate hedgers. . . .

H.R. 13113 will provide those regulations which are reasonably necessary to guide the activities of speculators . . . and no legitimate speculator . . . should object to its provisions." 80 Cong. Rec. 10739 (April 11, 1974). Representative Zwach, also a member of the Committee, stated "This legislation creates an impartial umpire, a commission that will handle the public interests, the producers' interests, the consumers' interest." *Id.* at 10740. Representative Adams claimed that "Our experiences . . . demonstrate the disastrous effects which unfair trading practices can have on consumers and producers alike." *Id.* at 10741. And Senator Scott claimed that "For the consumer, this bill will mean that commodity prices will more clearly reflect demands and actual available supplies. The kind of speculation which places artificial strains on prices will be under close scrutiny. This will mean more realistic prices for the farmer and the end products like break for the consumer will likewise be less subject to rapid increase and decrease in demand." 80 Cong. Rec. 30467 (Sept. 9, 1974).

Although speculators were recognized as necessary to the extent that they might, by increasing market volume and assuming market risks, provide more liquidity in the market for the benefit of producers and consumers and thus hopefully minimize price fluctuations to achieve some of the protection and price stability considered beneficial, Congress generally took a dim view of speculative activity in the commodity futures market because of the dangers speculators posed to farmers, producers, consumers, processors, shippers and hedgers. Unlike a hedger, who actually produces or handles the commodity, giving him an interest in the cash market for it, and trades in futures

as a means of minimizing his risks, the speculator, such as plaintiffs here, has no underlying interest in the cash market. He merely attempts to profit on the rise or fall of prices for commodity futures. Congress' skeptical attitude toward the benefits of speculation and speculators is further demonstrated by the failure of § 3, which outlines the Act's purposes, to mention speculators or investors as beneficiaries. In contrast § 3 does refer expressly to the interest of the "producer," "consumer," "shippers, dealers, millers and others engaged in the handling of commodities." Nor is this omission explained by the majority's suggestion that Congress desired to state a commerce power basis for the legislation. If speculators were viewed as a tempering and liquifying influence on an interstate market, reference to them in § 3 would have been consistent with a desire to invoke the Commerce Clause.

The various House and Senate reports on the Act and its various amendments over the years simply confirms the plain language of § 3. In 1921 the Senate Committee stated with respect to the proposed Grain Futures Act of 1922 (the first version of what was to become the Commodity Exchange Act):

> "It is believed that this bill will, by wiping out obvious abuses that are practiced on grain exchanges, result in more stable markets, and thereby enable the *producers* to secure more nearly the market price for the grain that has been possible in the past.
>
> *"Its primary purpose is to eliminate from the market some of the undesirable practices of professional speculators.*

> "In addition to curbing excessive speculation and manipulation, the bill authorizes the Secretary of Agriculture to provide means to prevent members of the exchanges from disseminating false and misleading reports on the market or on crop conditions. This in itself will be a check of the activities of professional speculators." (Emphasis added). S. Rep. No. 212, 67th Cong., 1st Sess., 4-5 (1921).

In 1936 the Senate Report on the proposed amendments stated:

> "It is of utmost importance . . . that means be adopted whereby the Government may be in a position to protect the producer and the public generally against abuses growing out of uncontrolled speculation on public markets." S. Rep. No. 1431, 74th Cong., 1st Sess. 3 (1936).

The 1936 House Report opened with a quote from President Roosevelt's first message to Congress which urged Congress to eliminate "unnecessary, unwise and destructive speculation" and "restrict, as far as possible, the use of exchanges for solely speculative operations," H.R. Rep. No. 421, 74th Cong., 1st Sess. 2 (1935), see 78 Cong. Rec. 2264 (1934), and went on to state

> "The fundamental purpose of the measure is to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves . . .

> "Since the passage of the Securities Exchange Act of 1934 there has been observed an increasing tendency on the part of professional speculators to transfer their activities from the securities markets, a tendency which makes the enactment of this bill without further delay of utmost importance." *Id.* at 2.

The 1974 House Report opened once again with President Roosevelt's attack on speculation, H.R. Rep. No. 93-975, *supra*, at (iii) and the Senate reports in both 1974 and 1978 used as their statement of purpose the above quoted language from the 1936 House Report. S. Rep. No. 1131, 93d Cong., 2d Sess. 1, 14 (1974); S. Rep. No. 850, 95th Cong., 2d Sess. 12 (1978). The majority contends that Congress' concern about injury to the "markets themselves" evinces an intent to protect speculators. But the clear language of the legislative history refutes that contention. Congress intended to protect exchanges from the abuses of their own members and other traders, not to protect speculators from themselves. S. Rep. No. 93-1131, *supra*, at 14; S. Rep. No. 95-850, *supra*, at 8.[6]

Throughout all these years, as the majority recognizes, the congressional debates were replete with vituperative attacks on speculators, particularly in 1922 and 1936, e.g., 61 Cong. Rec. 4763, 4765, 4768 (1921) (Remarks of Senator Clapper that if the farmer is to survive, "the grain gambler must go"); e.g., 80 Cong. Rec. 7857 (1936) (Remarks of Senator Murray

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[6] As stated by this court in *Miller v. New York Produce Exchange*, 550 F.2d 762, 768 (2d Cir. 1977), "the ultimate aim and intent of the Act is the elimination of wrongful conduct on the part of the traders. It is they, not the exchanges, who manipulate commodity markets."

that "the grain producer's income will be materially increased if the wild orgies in grain speculation can be controlled"). Congressional hostility toward speculation, though tempered, continued in 1968 and 1974. E.g., 113 Cong. Rec. 34404 (Nov. 30, 1968) (Remarks of Representative Sullivan that "excessive speculation in futures . . . has not only contributed to inflationary surges in the futures market but has caused spectacular increases in consumer prices"); 80 Cong. Rec. 30465 (Sept. 9, 1974) (Remarks of Senator Hart that "This bill gives the commission authority . . . to prevent inflationary prices which do not reflect supply and demand—but are the result of speculation. . . .").

Moreover, it has been the speculators and the Congressmen representing their interests who have consistently opposed the expansion of federal regulation of the commodity markets, since they realize that it is they who are being regulated. See, e.g., H.R. Rep. No. 1522, 73d Cong., 2d Sess. (1934) (minority report); H.R. Rep. No. 93-975, *supra*, at 166 (1974) (minority report) ("We believe that the bill's premise displays . . . a lack of faith in . . . the importance of speculators. . . ."); 120 Cong. Rec. 10744 (April 11, 1974) (Statement of Representative Symms that we need "more not less" speculation). It may well be that investors do benefit from an honest market, but that is a far cry from concluding that the Act was enacted for their "especial benefit." As put on the House floor "Speculation may not be evil, but neither is it a thing of beauty and a joy forever." 113 Cong. Rec. 10838 (August 11. 1967) (Statement of Assistant Secretary of Agriculture Mehrens before the House Committee on Agriculture, quoted on the House floor). And Representative Smith in 1974 summed up the prevailing view that speculation was a necessary evil:

> "When these markets were first brought under Federal regulation back in 1922—Grain Futures Act—it was recognized that involving some gamblers would be necessary in order to provide the liquidity needed so dealers in commodities could readily hedge their transactions.
>
> "The Commodity Exchange Act was designed to limit and regulate this form of gambling in tandem with hedging for the purpose of reducing 'sudden or unreasonable fluctuations in the prices . . . which are detrimental to the producer or the consumer and the persons handling commodities. . . .' Clearly, the primary purpose of the law which permits commodity markets to exist is to serve those who hedge, and speculation is to be permitted only to the extent that it serves the primary purpose." 120 Cong. Rec. 10750 (April 11, 1974).

Thus, given the general opposition of speculative interests to these bills and Congress' skepticism about the benefits of speculation and its keen awareness of the dangers posed by speculative excesses, it is disingenuous to claim that the Act was designed for the *especial* benefit of speculators. Speculators such as plaintiffs can hardly be said to be the "favored wards" of Congress. Nor is the language of the Act as a whole or of its provisions drafted with an "unmistakable focus on the benefited class." *Cannon, supra,* 441 U.S. at 691. The Court's language in *Piper v. Chris-Craft Industries, Inc., supra,* 430 U.S. at 37, applies here:

> "As previously indicated, examination of the statute and its genesis shows that Chris-Craft [a defeated tender-offerer] is not an intended beneficiary of the Williams Act, and surely is not one 'for

whose especial benefit the statute was enacted.' Ibid. To the contrary, Chris-Craft is a member of the class whose activities Congress intended to regulate for the protection and benefit of an entirely distinct class, shareholders-offerees. As a party whose previously unregulated conduct was purposefully brought under federal control by the statute, Chris-Craft can scarcely lay claim to the status of 'beneficiary' whom Congress considered in need of protection."

Accord, *Liang v. Hunt*, 477 F. Supp. 891 (N.D. Ill. 1979) (nothing in the language of § 9(b) or its legislative history indicates that it was enacted for the especial benefit of speculators). *Stone v. Saxon and Windsor Group, Ltd.*, CCH Comm. Fut. L. Rep. Par. 31,100 (N.D. Ill. 1980) ("the entire history of commodities regulation" suggests that "ensuring the integrity of the market system, rather than merely protecting individual customers" has been the motivating force behind the Act.").[7]

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[7] The majority mistakenly relies on a statement in the 1978 House Report to the effect that under the 1936 amendments "the community protected under the federal commodities law was expanded to include speculators," H.R. Rep. No. 1181, 95th Cong., 2d Sess. 84 (1978). Quite apart from the fact that the quote comes from a law review article simply incorporated into a subsequent House Report (1978) and is therefore not entitled to the weight normally given to committee reports, see *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 48 U.S.L.W. at 4662 (post-hoc statement of a subsequent conference committee report not entitled to much weight in discerning the intent of an earlier Congress) and *Southeastern Community College v. Davis*, 442 U.S. 397, 411 n.11 ("[t]hese isolated statements by individual Members of Congress or its committees, all made after the enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment"), the statement simply does not support plaintiffs' position here. Even assuming that the legislative

Thus § 9(b), like § 4b, does not disclose any desire to benefit a special class of which plaintiffs are members. When read in the light of the Act's overall purposes it appears to have been enacted for the benefit of the public, including producers and consumers of commodities, not that of speculators or investors.[8] In any event,

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history does show an intent to offer *some* protection to speculators, there is no suggestion that Congress enacted the statute for the *especial* benefit of speculators or intended to confer a private right of action in favor of speculators. Indeed, the legislative history is just to the opposite; Congress was primarily concerned about producers and consumers.

The majority's reliance on our decision in *Ames v. Merrill Lynch, Pierce, Fenner & Smith*, 567 F.2d 1174 (2d Cir. 1977), as supporting a private right of action is similarly misplaced. There the dispute involved a *customer and his broker* and we declined to compel arbitration, noting that "on this appeal, we are not called upon to decide whether the complaint states a claim for relief." *Id.* at 1176. Thus, the court's passing statement that the Act was enacted for the protection of "investors" has no bearing whatsoever on the question before us, whether the Act was designed for the especial protection of these plaintiffs, who are speculators, not customers.

Footnote 25 of the majority opinion suggests that regulated persons may belong to the class for whose special benefit a statute is enacted, with which we do not disagree. However, where (as here) Congress has specifically enumerated the persons for whose benefit the statute has been enacted (i.e., the public, producers, consumers, shippers, dealers, millers and hedgers) but has studiously omitted speculators, we may reasonably infer that Congress did not intend to include speculators among the benefited group.

8 Some of the plaintiffs here also allege that the defendant brokers have violated § 4a of the Act, 7 U.S.C. § 6a. Section 4a states in relevant part that "Excessive speculation in any commodity under contracts of sale of such commodity for future delivery . . . causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, *is an undue and unnecessary burden on interstate commerce in such commodity*" and authorizes the CFTC to fix quantitative limits on trading "for the purpose of diminishing, eliminating, or preventing such burden. . . ." (Emphasis added). The CFTC has set by regulation certain limits on short trading which are alleged to have been violated by the short sellers with the knowledge of their brokers. 17 C.F.R. § 150.10.

No court has ever found a private cause of action to exist under § 4a. The section serves as a general prohibition against excessive

even assuming *arguendo* that this criminal statute benefits speculators, there is not the slightest suggestion in the language or legislative history of § 9(b) that Congress impliedly intended it to be enforced by private civil suits for damages. The remedies provided by Congress are found elsewhere in the Act.

(2) *Sections of Act relied on by plaintiffs to support claims against the contract market defendant.* (§§ 5(d), 5a(8) and 9(b), 7 U.S.C. §§ 7(d), 7a(8) and 13(b))

Appellants rely upon portions of §§ 5 and 5a of the Act, 7 U.S.C. §§ 7 and 7a, and to a lesser extent on § 9(b), 7 U.S.C. § 13(b), already discussed above, as the

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speculation in commodity futures and its purpose—the removal of the burden of excessive speculation on interstate commerce in order to stabilize the price of the commodity itself, not the price of the future contract—is clearly described. The plain language of the section, then, indicates that it was designed for the protection of the general public. Nor is there any suggestion that Congress intended to confer any private right of action upon any person, let alone a speculator, who might be claimed to be damaged as a consequence of a violation of the section. See *Transamerica, supra*, 100 S. Ct. at 247; *Kissinger, supra*, 48 U.S.L.W. at 4226. Only one case has even addressed the issue of an implied cause of action under § 4a and it concluded that investors were not within the class of persons for whose especial benefit the statute was created, reasoning that "the excessive speculation provision is primarily intended to protect outsiders from the activities of all speculators, not speculators from themselves." *Liang v. Hunt*, 477 F. Supp. 891, 893 (N.D. Ill. 1979).

Plaintiffs also charge that the defendant brokers violated Exchange Rule § 44.02 by failing to have liquidating orders placed within five minutes after the close of the trading limits even though they knew or should have known that their customers could not deliver potatoes. Since it is now well recognized that a private right of action may not be implied for a violation of a rule of the New York Stock Exchange, *Jablon v. Dean Witter & Co.*, 614 F.2d 677 (9th Cir. 1980), it is not surprising that the majority makes no effort to claim that plaintiffs here have a cause of action against the brokers for their alleged violation of Exchange Rule § 44.02. Accordingly, we need not address the issue.

source of an implied private right of action against New York Mercantile Exchange and its officers. Section 5 is a licensing statute which imposes upon the CFTC the duty of designating boards of trade as "contract markets" provided they comply with specified conditions and requirements, including in subdivision 5(d) "the prevention of manipulation of prices and the cornering of any commodity by the dealers and operators" upon the Exchange.[9] Section 5a, 7 U.S.C. § 7a, provides that each contract market shall comply with 12 requirements, including the enforcement of its own rules, regulations and resolutions which have been approved by the CFTC, § 5a(8) of the Act, 7 U.S.C. § 7a(8).[10]

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9 Section 5 provides in relevant part:

"The Commission is hereby authorized and directed to designate any board of trade as a 'contract market' when, and only when, such board of trade complies with and carries out the following conditions and requirements:

a. [when it is located in a terminal market where any cash commodity is sold in sufficient quantities so that futures contracts fairly reflect the general value of the commodity]
b. [when it provides for the filing of reports concerning the transactions occurring on the exchange]
c. [when it provides for the prevention of the dissemination of false information by the board or any member]
d. When the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board. . . ."

10 Section 5a(8), 7 U.S.C. § 7a, reads in relevant part:

"§ 5a *Duties of contract markets*

"Each contract market shall—

• • • • •

"(8) enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have

Plaintiffs here allege that the New York Mercantile Exchange violated the Act and the Regulations by failing (1) to maintain an orderly market for trading, (2) to report violations, (3) to direct the entry of liquidating orders, (4) to declare an emergency, (5) to extend the period for delivery or to allow delivery by truck, (6) to buy potatoes for the account of short sellers who did not make delivery as required by their contracts, and (7) to perform its duties as a contract market, including exercise of due care to halt manipulative practices.

As the Court pointed out in *Cannon, supra,* 441 U.S. at 690 n.13, a statute will ordinarily be construed as creating an implied private remedy only where it "explicitly conferred a right directly on a class of persons including the plaintiff in the case." Here the prescriptive language of § 5 and § 5a, like the reporting statute in *Redington, supra,* 442 U.S. at 569, "does not

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been approved by the Commission pursuant to paragraph (12) of this section; and revoke and not enforce any such bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, which has been disapproved by the Commission; . . ."

In addition to subsection (8), § 5a requires contract markets to (1) furnish the CFTC with copies of its by-laws and regulations, keep records of all of the proceedings of its governing board, (2) require the operators of the warehouses to keep records and make them available for inspection by the CFTC, (3) obey CFTC orders concerning the delivery of the cash commodity, (4) require the party making delivery to furnish notice of intended delivery to the party obligated to accept delivery, (5) require that warehouse receipts be accepted as satisfaction of debt, (6) enforce its by-laws and regulations relating to the minimum financial standards required of those future commission merchants who are members of the market, (7) permit delivery of any commodity in a location which will tend to prevent price manipulation, (8) provide for an arbitration procedure for customer grievances, § 5a(11), and (9) submit to the CFTC for approval its by-laws, rules, regulations and resolutions, § 5a(12).

by its terms, purport to create a private cause of action in favor of anyone." Neither provision "grants private rights to the members of any identifiable class, nor proscribes any conduct as unlawful," *id.* They therefore cannot support a private cause of action in favor of these plaintiffs.

Nothing in the foregoing sections of the Act provides any basis for an inference that they were enacted for the especial benefit of plaintiffs, much less that a private right of action was intended. Here again Congress' adoption of a battery of other express remedies indicates it had no intent to create or approve an implied private right of action against exchanges. See *Transamerica, supra,* 100 S. Ct. at 247-48. Although exchanges may not be the subject of reparations proceedings, if they violate the Act the CFTC may suspend or revoke their designation as contract markets, §§ 5b, 6(a) of the Act, 7 U.S.C. §§ 7b, 8, sue in federal courts, which are expressly vested with jurisdiction, to enjoin violations, 6c of the Act, 7 U.S.C. § 13a-1, assess civil fines of up to $100,000 for each violation and issue cease and desist orders, non-compliance with which subjects the market and its officers to a $100,000 fine or imprisonment. § 6b of the Act, 7 U.S.C. § 13a. The exchanges, of course, are also subject to criminal penalties of up to a $500,000 fine and 5 years imprisonment for violations of the Act and price manipulation. § 9(b) of Act, 7 U.S.C. § 13(b).

Lastly, in 1968 Congress failed to enact a bill which would have made contract markets liable to aggrieved persons for violations of the Act. H.R. 9178, 90th Cong., 1st Sess. § 32 (1967); see Statement of Representative Fino introducing the bill, 113 Cong. Rec. 10839 (April 26, 1967). This indicates that

Congress did not intend to sanction a private remedy against exchanges.[11]

OTHER CIRCUMSTANCES POSSIBLY BEARING ON LEGISLATIVE INTENT TO CREATE OR APPROVE AN IMPLIED PRIVATE ACTION

(1) *Pre-1974 lower federal court decisions implying private rights*

Faced with the fact that nothing in the language of the Commodity Exchange Act, the various amendments of it over the years, and its legislative history even remotely suggests congressional intent to approve, much less create, an implied private right of action, the majority relies almost completely on the fact that prior to the 1974 amendments various lower federal courts, beginning in 1967, had implied certain types of private rights of action under the Act and that Congress' failure, in face of these decisions, to expressly extinguish or nullify these decisions must be taken as evidence of an intent *sub silentio* to approve the continued implication of private actions under the Act.[12] In short, the argument goes, in amending the Act

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11 Significantly, the 1968 amendments consisted of 27 sections. Of these, 13 sections and 3 subsections are identical to H.R. 9178, Representative Fino's bill, Pub. L. No. 90-258 §§ 1(a), 1(b), 3, 6, 7(a), 9, 10, 11, 13, 14, 15, 18, 19, 22, 30, 34; 82 Stat. 26, *et seq.* (1968), and 8 sections and 2 subsections are altered versions of his provisions, Pub. L. No. 90-258 §§ 2, 4, 5, 7(b), 8, 12(b), 16, 20, 24, 25; 82 Stat. 26, *et seq.* (1968). This indicates, of course, that Congress acted with discrimination and care in rejecting § 32, the provision authorizing private damage suits.

12 *Anderson v. Francis I. duPont & Co.*, 291 F. Supp. 705, 710 (D. Minn. 1968); *Hecht v. Harris, Upham & Co.*, 283 F. Supp. 417, 437 (N.D. Cal. 1968), *modified*, 430 F.2d 1202 (9th Cir. 1970); *United*

in 1974 Congress had the burden of taking affirmative action to disapprove implied private rights found by some courts to have existed under the Act and, in the absence of its doing so, the holdings of these decisions may be presumed to survive.

The argument puts the cart before the horse. Where, as here, Congress has expressly provided for judicial and administrative means of enforcement, the burden is on plaintiffs to show a clear and affirmative congressional intent to approve a private right of action, not on Congress or defendants to show that the remedies provided by it are exclusive. *Transamerica, supra,* 100 S. Ct. at 247; *Securities Investors Protection Corp. v. Barbour, supra,* 421 U.S. at 419; *Amtrak, supra,* 414 U.S. at 458. The issue is whether Congress intended to approve a private right of action, not whether (as the majority frequently states, maj. opin. p. 65 n.40) it intended to "destroy" or "eliminate" a pre-existing private right, which assumes the matter in controversy. Nor may we simply presume that Congress by its silence intended to approve a "pre-existing" private right of action, since the Supreme Court has made clear that "in the absence of the clearest indication that

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Egg Producers v. Bauer International Corp., 311 F. Supp. 1375, 1384 (S.D.N.Y. 1970); *Booth v. Peavey Company Commodity Services*, 430 F.2d 132, 133 (8th Cir. 1970); *McCurnin v. Kohlmeyer & Co.*, 340 F. Supp. 1338, 1343 (E.D. La. 1972), *affd.*, 477 F.2d 113 (5th Cir. 1973); *Gould v. Barnes Brokerage Co., Inc.*, 345 F. Supp. 294, 295 (N.D. Tex. 1972); *Johnson v. Arthur Epsey, Shearson, Hamil & Co.*, 341 F. Supp. 764, 766 (S.D.N.Y. 1972); *Arnold v. Bache & Co.*, 377 F. Supp. 61, 65 (M.D. Pa. 1973); *Deaktor v. L. D. Schreiber & Co.*, 479 F.2d 529, 534 (7th Cir.), *revd. on other grounds sub nom., Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973) (per curiam); *Seligson v. New York Produce Exchange*, 378 F. Supp. 1076, 1084 (S.D.N.Y. 1974), *affd. sub nom., Miller v. New York Produce Exchange*, 550 F.2d 762 (2d Cir.), *cert. denied*, 434 U.S. 423 (1977).

Congress intended that" a new statute "should preserve" a pre-existing private cause of action, it would "decline" to imply one under the new statute. *T.I.M.E. Inc. v. United States, supra,* 359 U.S. at 475. To hold otherwise is to stand the principles of *Cort v. Ash* and the more recent Supreme Court decisions on their heads. Quite apart from this fundamental defect, the argument must be rejected for the reason that a close examination of the decisions and legislative history relied on by the majority demonstrates that they do not support a *sub silentio* intent by Congress in 1974 to approve implied private rights of action.

In the first place the earlier decisions and legislative history do not reveal any long-recognized private cause of action in favor of speculators such as plaintiffs against contract markets or broker-dealers with whom the speculators had no customer-broker relationship. For 45 years prior to the first decision relied on by the majority the provisions of the Act were enforced solely through use of the administrative remedies made available to the Secretary of Agriculture and the Commodity Exchange Commission, the predecessor to the CFTC, and through criminal proceedings based upon violations of the Act. Despite such incidents as the manipulation of the onion futures market in the 1950's, see S. Rep. No. 1631, 85th Cong., 2d Sess. 1958), reprinted at 1958 U.S. Code Cong. & Ad. News 4210, 4214, the salad oil swindle of the early 1960's, N. Miller, The Great Salad Oil Swindle, and other less publicized schemes to manipulate the market and defraud participants, and despite the implication of a private right of action under the Securities Act as early as 1944, *Baird v. Franklin,* 141 F.2d 238 (2d Cir.), *cert. denied,* 323 U.S. 737 (1944), no court prior to 1967

suggested that a private cause of action under the Act might exist.[13] Even the Commodity Exchange Commission believed that administrative sanctions and criminal penalties were the only means by which the Act could be enforced. See letter from Department of Agriculture, Commodity Exchange Authority, dated March 21, 1958, to counsel for the Senate Committee of Agriculture and Forestry, reprinted at 1958 U.S. Code Cong. & Admin. News 4216.[14]

Goodman v. H. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967), was the first case to break the barrier. It is significant not because it was the first but because it is the case on which all of the later decisions implying a

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13 The majority opinion (footnote 16) chooses to interpret our statement as implying that "victims of frauds in futures trading had never resorted to the federal courts prior to *Goodman* (infra)", whereas we actually state that prior to that decision no court had held that a private cause of action under the Act would be recognized. There may well have been lawsuits, but the legal basis of the claims made in these suits is not reported and, more important, prior to 1967 no court to our knowledge ever passed on the issue here, i.e., the existence of an implied private right of action.

14 The letter reads in relevant part:

"Dear Mr. Stanton [Counsel on Agriculture and Forestry, United States Senate.]

. . . . . .

"You requested a memorandum concerning the effect of the absence from these bills of any provision to amend section 9 of the Commodity Exchange Act so as to make a violation of proposed section 4j a violation of the penal provisions of the act.

"As you recognize, in the absence of a provision subjecting violations of the proposed section to the criminal provisions of the statute, it would appear that the *sole* means of enforcement afforded by the act would be by way of administrative complaints. [Emphasis added].

"Sincerely,

Rodger R. Kaufman,
Administrator."

private cause of action summarily relied. All of these were lower federal court decisions. The Supreme Court never passed upon the issue. *Goodman* involved a suit brought under § 4b by two customers against their broker-dealer in which they claimed they were defrauded by the broker-dealer. The court, relying on § 286 of the Restatement of Torts, found that the customers fell within the class of persons Congress intended to protect when it enacted § 4b (i.e., customers) and that violation of the section was a statutory tort for which the customers had a federal remedy. The court also relied on the dissent in *Wheeldin v. Wheeler*, 373 U.S. 647, 661-62 (1961), which stated that private rights are "implied unless the legislature evidences a contrary intention." Finding "no indication in the Commodity Exchange Act that Congress intended not to allow private persons injured by violations access to the courts," 265 F. Supp. at 447, the court implied a private remedy.

It hardly merits discussion that *Goodman*, in light of current law, was wrongly decided since it did not even purport to consider, as required by the recent cases of *Cannon*, *Redington*, *Transamerica*, and *Kissinger* and earlier by *Cort v. Ash*, whether Congress intended to create a private right of action when it enacted § 4b. Indeed, the Court has repeatedly rejected the tort rationale relied upon in *Goodman*, requiring a showing of Congressional intent to approve a private right of action. See, e.g., *Redington*, *supra*, 442 U.S. at 568, 578, quoting *Cannon*, *supra*, 441 U.S. at 688. More significantly, perhaps, is that *Goodman* may well have been incorrectly decided even under then existing law. The proposition that a private right of action will be implied unless Congress evinces a contrary intention is

unsupported by any prior holding and did not accurately reflect the state of the law as it then or later existed. Even *J.I. Case Co. v. Borak, supra,* 377 U.S. 426, widely considered to be the case in which the Supreme Court has gone the furthest in implying a cause of action, required more of a showing than did the *Goodman* court. The test, according to *Borak,* was whether a private right of action was necessary to effectuate Congress' intent in enacting the statute. *Id.* at 432.

Nor can we presume the correctness of the *Goodman* decision simply because it occurred during a period in which private rights of action were "routinely implied" by the courts. The majority overstates the extent to which courts were then implying private causes of action, ignoring such cases as *Wheeldin v. Wheeler,* 373 U.S. 647 (1963); *T.I.M.E. Inc. v. United States,* 359 U.S. 464 (1959); *Montana & Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U.S. 246 (1951); *General Committee v. M.K.T.R. Co.,* 320 U.S. 323 (1943); *General Committee v. Southern Pacific Co.,* 320 U.S. 338 (1943); *Switchman's Union v. National Mediation Board,* 320 U.S. 297 (1943), all of which rejected such claims of private right. And even in the area of securities, the courts denied private rights of action. E.g., *Colonial Realty Corp. v. Bache & Co.,* 358 F.2d 178 (2d Cir.), *cert. denied,* 385 U.S. 81 (1966); *O'Neill v. Maytag,* 339 F.2d 764 (2d Cir. 1964).

The majority contends, however, that the correctness of the *Goodman* decision, and the cases summarily following it, is irrelevant, reasoning that what matters instead is whether Congress perceived those cases to be correct when it enacted the 1974 amendments. But even accepting this proposition, not a single word of

approval of these decisions is found in the legislative history of the 1974 or any other amendments, much less mention of any of these decisions by name. Moreover, the lower court decisions relied on by the majority do not support its position. Of the 11 cases decided prior to 1974, 8 were brought *by customers against their brokers-dealers under* § *4b*, not by speculators like plaintiffs against broker-dealers with whom they had no relationship. See, e.g., *Anderson v. Francis I. du Pont & Co.*, 291 F. Supp. 705 (D. Minn. 1968); *Hecht v. Harris, Upham & Co.*, 283 F. Supp. 417 (N.D. Cal. 1968), *modified*, 430 F.2d 1202 (9th Cir. 1970); *Booth v. Peavey Company Commodity Services*, 430 F.2d 132 (5th Cir. 1970); *Johnson v. Arthur Espey, Shearson, Hamill & Co.*, 341 F. Supp. 746 (S.D.N.Y. 1972); *Gould v. Barnes Brokerage Co. Inc.*, 345 F. Supp. 294 (N.D. Tex. 1972); *McCurnin v. Kohlmeyer & Co.*, 340 F. Supp. 1338 (E.D. La. 1972), *affd.*, 477 F.2d 113 (5th Cir. 1973); *Arnold v. Bache & Co., Inc.*, 377 F. Supp. 61 (M.D. Pa. 1973). Likewise the Sixth Circuit's recent decision, *Curran v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, No. 77-1300, SRLR (BNA) G-1 (May 12, 1980), relied on by the majority, is not dispositive of this case since it also involved a suit by a customer against his broker under § 4 of the Act, 7 U.S.C. § 6. Although § 4b could conceivably be construed as protecting customers against being defrauded by their brokers, it certainly does not protect others, such as plaintiffs here, against fraud or manipulation by persons with whom they had no broker-dealer relationship.

To be sure, three cases did imply a private right of action in favor of someone other than a customer against his broker. However, two are irrelevant for the

purpose of inferring what Congress may have "perceived" the state of decision law on the subject to be in 1974. In *United Egg Producers v. Baurer International Corp.*, 311 F. Supp. 1375 (S.D.N.Y. 1970), the court, relying on *Goodman*, implied a cause of action under § 9(b) of the Act in favor of a group of commodity producers, not customers or mere traders, who sought injunctive relief, not damages, against an import company to prevent them from releasing inaccurate investment information. In *Seligson v. New York Produce Exchange*, 378 F. Supp. 1076 (S.D.N.Y. 1974), *affd. sub nom., Miller v. N.Y.P.E.*, 550 F.2d 762 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977), the court, relying on *Deaktor, infra*, held that a cause of action was available to a broker-dealer, not a customer or even a trader, against an exchange under § 9(b). Since that case, however, was decided after the House had passed the 1974 amendments, Congress could not have been aware of it. It therefore offers no support for the majority's theory that Congress, by relying upon it, thought it unnecessary to provide expressly for a private right of action.

Thus plaintiffs are reduced to one case, *Deaktor v. L.D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *revd. on other grounds sub nom., Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973), decided less than a year before the enactment of the 1974 amendments, as support for the private cause of action asserted here. There a trader brought suit against an exchange for a violation of § 5a(8) and § 9(b), and the court, relying on *Goodman*, found that § 9(b) was intended to protect the interests of the plaintiff traders and accordingly implied a cause of action under it, though not under § 5a(8). Although the majority contends that the

Supreme Court's reversal of *Deaktor* can be read as support for the lower court's implication of a private right of action, that argument is without merit since the Court expressly declined to decide the issue and held that plaintiffs must proceed through the CFTC, not through the courts. See 414 U.S. at 115. Where the Supreme Court has declined to reach an issue, it is serious error to parse the Court's opinion for some hidden indication that the Court actually decided the issue after all. The majority's strained interpretation of *Deaktor* is illusory.

In speculating as to what Congress must have "perceived" about the state of the law relating to implied rights when it overhauled the Act in 1974, one must take into account as against *Deaktor*, which was not finally disposed of by the Supreme Court until December 3, 1973, see 414 U.S. 113, the Court's decision in *Amtrak, supra*, 414 U.S. 453, decided on January 9, 1974. There the Court rejected a claim of an implied private right under § 307(a) of the Amtrak Act, relying on Congress' rejection of an express remedy and its express authorization of other remedies, stating that "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies," 414 U.S. at 458.

The majority also relies heavily on the fact that "[d]uring the 1940's, 1950's and 1960's there was a widespread, indeed almost general, recognition of implied causes of action for damages under many provisions of the Securities Exchange Act" (majority opinion, p. 23), apparently on the theory that we must infer that Congress in enacting the 1974 Amendments assumed that the courts would as readily imply a cause

of action under the Commodity Exchange Act as they had under the securities laws. That argument has a number of serious flaws.

First, the Supreme Court in *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 2, 13 n.9 (1971), merely acquiesced in the *25-year old* acceptance by the lower courts of an implied private right of action under § 10(b) of the Securities Exchange Act. See *Cannon, supra*, 441 U.S. at 690-93, n.13, which suggests that absent that long-standing prior interpretation the Supreme Court would not have found a private right of action under § 10(b). Since there is no such long-standing history of judicially implied rights under the Commodity Exchange Act, there is simply no basis for inferring that Congress could have assumed that the Court would similarly acquiesce in a private right of action under that Act.

Second, the majority seems to suggest that, because a number of the early securities cases implied a private right of action under the securities laws even though those laws contained express remedies, Congress could assume that the courts would similarly imply a private right of action under the Commodity Exchange Act, which also contains a number of express remedies. That is simply not the case. In *Baird v. Franklin*, 141 F.2d 238, 244-45 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944), heavily relied on by the majority, Judge Clark implied a private right of action under the Securities Exchange Act of 1934 because the express remedies were merely punitive and remedial, not compensatory. Section 14 of the Act here, in marked contrast, expressly provides for compensatory damages. Since the securities laws provide for less complete remedies than the Commodity Exchange Act, any analogy between the judicial history

of private rights of action under the securities laws and the Commodity Exchange Act is bound to be of limited relevance.

Third, the majority seeks to distinguish such cases as *Transamerica, supra,* 100 S. Ct. 242, and *Redington,* 442 U.S. 560, on the ground that the 1974 Amendments were passed well after the "great explosion" of judicially recognized private rights of action. The majority, however, ignores the fact that the sections of the Act most heavily relied on by plaintiffs, §§ 4b, 9(b) and 5d, were all enacted in 1923 and 1936, well before any "explosion" in private rights of action. Like the statutes in *Redington* and *Transamerica,* nothing in the legislative history of 1923 or 1936 indicates that Congress intended to create a private right of action under any of the provisions relied on by plaintiffs.

As the law existed prior to 1974, then, the majority's contention that the courts had long recognized a private right of action in favor of these plaintiffs rings hollow. The Supreme Court had never spoken on the subject. No lower federal court had implied a cause of action under § 5(d), § 5a(8), or § 4a. Nor had any court implied a cause of action in favor of one not a customer against a broker-dealer under § 4b. *Deaktor,* which implied a cause of action in favor of a speculator against an exchange under § 9(b), had been decided less than a year before the enactment of the 1974 amendments. This decision, which was never mentioned in the congressional debates as a basis for an implied right of action, is the sole case which could conceivably be relied upon as pre-1974 authority for the proposition advanced by the majority here that Congress "perceived" the private rights of action to be available under the Act in favor of speculators against brokers or

exchanges. It seems most unlikely that Congress had even heard of it, much less relied upon it in adopting the 1974 amendments. Given the crucial importance of *Deaktor* to the majority's argument, Congress' failure to mention *Deaktor* is highly significant, despite the majority's protestations to the contrary. Absent some indication that Congress knew that a lower court had implied a private right of action in favor of a *speculator against an exchange,* as opposed to its possible knowledge that the court had implied a private right of action in favor of a *customer against his broker under* § *4b,* we simply cannot presume that Congress was aware of *Deaktor,* let alone silently approved of the private right of action it found.

(2) *References in Congress to Private Civil Suits*

The majority next relies upon a few scattered references to private civil actions in the course of hearings by House and Senate Committees with respect to the proposed 1974 amendments. None of these, however, reveal any approval or ratification of such rights. Indeed the evidence is overwhelming to the contrary.

The Senate

Not a single mention of private civil actions is to be found either in the Senate Committee Report with respect to the 1974 bill or on the Senate floor. The only references during the lengthy Senate hearings were those of Senator Clark, Professor Schotland of Georgetown University, and Ms. Judy Jackson, a representative of the Consumer Federation of America, with respect to a provision in a bill introduced by Senator Hart which would have expressly authorized private

civil suits for violations of the Act, S. 2837, § 505(a), and treble damages for willful violations, § 505(b). During the Senate hearings on various proposed bills, including the Hart bill, H.R. 13113 (the already passed House bill), S. 2485 (the Humphrey Bill) and S. 2378 (the McGovern Bill), numerous witnesses specifically addressed the Hart Bill and vigorously urged that the Committee adopt the private right of action provided by it. Commodity Futures Commission Act: Hearings Before the Senate Committee on Agriculture and Forestry on S. 2485, S. 2578, S. 2837, and H.R. 13113, *supra*. Professor Schotland stated that it was "hard to be emphatic enough in favor of [§ 505]" and that "private citizen action for self protection, with full judicial protections, is an enormous step toward helping assure vigorous regulatory action," *id.* at 737, 747. Ms. Judy Jackson noted that neither the Humphrey Bill nor the House bill contained any provision for private civil actions; *id.* at 369. Senator Clark, co-sponsor of the Hart Bill and a member of the Committee, *id.* at 205, spoke in support of private treble damages under the bill. Professor Schotland warned about the need for explicit language approving private rights of action. He stated that if Congress decided to adopt the reparations procedure and place "such virtually unprecedented responsibility and burden in this regulatory body, there should be explicit language in the statute that Federal and State courts are still open if a complainant prefers to go to trial there," *id.* at 737, 747.

Congress rejected the bills. Under a principle of statutory construction expressly endorsed by the Supreme Court in *Amtrak, supra,* 414 U.S. at 461, a decision ignored by the majority on this point, where as here Congress has before it a specific proposal to

authorize private rights of action and after full and careful consideration declines to adopt that proposal, its action must not be treated as evidence of intent to approve private rights of action, but rather as an intent to preclude them. Moreover, its action certainly negates the majority's argument that Congress intended *sub silentio* to encourage the lower courts to continue to imply private rights of action.

It is suggested that Congress refused to adopt the private right of action proposals because of its opposition to treble damages. But this was never a position articulated by any lawmakers, who obviously could have eliminated the treble part of the damages with the stroke of a pen and left standing the provision for compensatory damages. The Senate instead chose to reject the proposition that civil monetary damages be recoverable in any action other than a reparations proceeding.[15]

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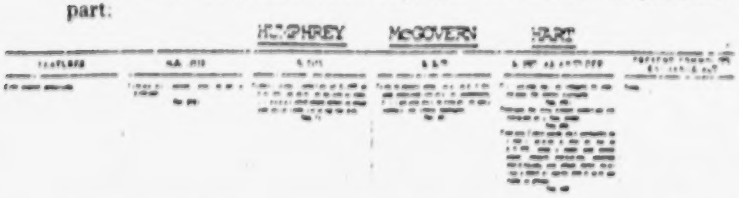
15 Indeed, the Senate had before it a chart comparing the provisions of the four bills under consideration, a chart that omitted any reference to the possibility that private damage suits were available under the existing Act. The comparison chart reads in pertinent part:



Commodity Futures Commission Act: Hearings before the Senate Committee on Agriculture and Forestry on S. 2485, S. 2578, S. 2837 and H.R. 13113, *supra*, at 194. Representative Neal Smith introduced a bill in the House, which like Senator McGovern's bill, expressly created an action for treble damages. H.R. 11195, 93d Cong., 1st Sess. § 17 (1973). In 1974, Rep. Smith introduced a similar bill which provided for the reparations procedure which was eventually enacted as § 14, but deleted the provision for treble damages. H.R. 11195, 93d Cong., 2d Sess. (1974).

The House

Turning to the history of the legislation before the House, the latter's Report with respect to the bill makes only two references to an implied private right of action, neither of which evince an intent by Congress to preserve that right. The Report stated that § 5a(8) of the 1968 amendments, which required contract markets to enforce their own rules and which was designed to strengthen self-regulation, had in fact worked to weaken it because, as the Committee was informed,

> "[A]ttorneys to several boards of trade have been advising the boards of trade to reduce—not expand exchange regulations designed to insure fair trading, since there is a growing body of opinion that failure to enforce the exchange rules is a violation of the Act which will support suits by private litigants." H.R. Rep. 93-975, *supra*, at 46.

The Report also stated that one of the reasons for changing the law was

> "(2) Growing difficulties facing exchanges engaged in self regulatory actions as a result of private plaintiffs seeking damages against self-regulatory activities of the markets. As examples, exchanges are sued for actions taken in emergency situations even when the action has been taken at the request or order of the CEA." *Id.* at 48.

Similar language was used by Chairman Poage when he discussed the bill on the House floor, 119 Cong. Rec. 41333 (Dec. 13, 1973).[16] Although it may demonstrate

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16 Chairman Poage also stated on the House floor that "when the Commodity Exchange Act was enacted, courts implied a private

an awareness by key personnel in Congress of lower court decisions implying a cause of action under the Act, it hardly constitutes approval of those decisions. In the first place, the Supreme Court has recently reminded us that "even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." *Consumer Product Safety Commission v. GTE Sylvania, Inc., supra,* 48 U.S.L.W. at 4662. Second, the language merely recognizes a "growing body of opinion" concerning private rights of action. Had Congress intended to approve or encourage that fledgeling body of law, it could and would have indicated as much. Third, rather than extol the virtues of private rights of action, the Report and Chairman Poage emphasized the problems created by private rights and pointedly criticized private suits against exchanges for action taken by them pursuant to order or request of the CEA, now the CFTC.

I find no logical basis for reading this rather explicit language criticizing private rights of action as congressional *approval* of such suits, which is what the majority attempts to do. The majority argues that Congress was not criticizing private rights of action but merely the problems they created and that, desiring private suits to continue, it sought to preclude exchanges from reducing their rules in order to avoid civil liability by empowering the CFTC to require the exchanges to adopt appropriate rules. This sheer speculative extrapolation is not supported by anything

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remedy for individual litigants in the Commodity Exchange Act." 119 Cong. Rec. 41333 (Dec. 13, 1973). He, of course, erred; a private right of action was not implied by a lower court until 1967.

in the legislative history of the amendments. Indeed it is refuted by the plain language of the House Report.[17]

A more sensible interpretation of the 1974 amendments is that Congress sought to create a uniform comprehensive, cohesive and coherent system of regulation, H.R. Rep. 93-975, *supra* at 1; S. Rep. No. 95-850, *supra*, at 10, 13. Believing that private rights of action were inconsistent with that purpose, it sufficiently increased the powers of the CFTC so that it, rather than private individuals, would be responsible for monitoring the futures trading market.[18]

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17 Chairman Poage himself retreated on the significance of private rights of action. In December, 1973, when he introduced the bill to the House he claimed that the threat of private suits was one reason why the exchanges had cut back on their rules. On April 11, 1974, however, when he presented the bill from his Committee to the House for approval he stated "Regulation by the exchanges is not working as well as it should, and *partly as a result of technicalities of present law* the exchanges may be cutting back on their self-regulatory activities when they should be increasing their efforts in todays markets." 120 Cong. Rec. 10736. (Emphasis added).

Private rights of action hardly constitute "technicalities of present law." Thus, on the day in which Congress' attention was most focused on the Commodity Exchange Act—in fact it was the day the House passed the bill—not one word was mentioned about private rights of action. It strains credulity to suggest, as the majority does, that Congress somehow *relied* on private rights of action when it enacted the 1974 amendments.

18 The majority also relies on the cursory objections to private rights of action raised by one or two representatives of the commodities industry in the House hearings, see, e.g., Commodity Futures Trading Act of 1974: Hearings Before the House Committee on Agriculture on H.R. 11955, 93d Cong., 2d Sess. 249 (1974). The majority reads far too much in the "failure" of Congress to respond to these scattered, vague and unfocused comments. As stated by the Supreme Court in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 204 n.24 (1975):

> "Remarks of this kind made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight. See, *e.g.*, *United States v. United Mine Workers*, 330 U.S. 258, 276-277

Intent in Enacting Reparations Procedure and Other Remedies

Both the 1974 Senate and House Reports exhaustively outline the enforcement tools available under the Act as it then stood, together with the additional remedies recommended and finally adopted. S. Rep. No. 1131, 93d Cong., 2d Sess. 11-27 (1974), H.R. Rep. 93-975, *supra*, 33-53. There is not the slightest suggestion that the panoply of enforcement remedies provided by Congress, including reparations proceedings, was intended to supplement private civil rights, as the majority here urges. Indeed, no legislator has ever linked the reparations procedure to private causes of action or mentioned them in the same breath. Though of course it is not defendants' burden to show that Congress intended an express remedy to be exclusive, what little direct evidence there is about the purpose of the reparations procedure suggests that it and the informal arbitration procedures were intended to be exclusive. The House Report, for example, stated that the reparations procedure is

> "intended as a separate remedy designed to supplement the informal 'settlement procedures' contemplated of contract markets. . . . It is the intent of the Committee that those complaints which can be resolved informally and settled without a formal proceeding [the reparations

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(1947); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942). This is especially so with regard to the statements of legislative opponents who '[i]n their zeal to defeat a bill . . . understandably tend to overstate its reach.' *NLRB v. Fruit Packers*, 377 U.S. 58, 66 (1964). See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951)."

> proceeding] through the mechanism contemplated of the contract market . . . should be encouraged to resolve that matter." H.R. Rep. 93-975, *supra*, at 22.
>
> "A customer reparations proceeding before the Commission will be authorized one year after date of enactment for handling customer complaints which arise from violations of the Act, particularly those which result in monetary damages loss to the customer. The commission will have original jurisdiction to consider *all such complaints* which have not been resolved through the informal settlement procedures required of the contract market and registered futures associations under the bill." *Id.* at 3.
>
> *"The provision for this review and settlement of customers accounts should make possible full and equal justice for those who feel that they have been in some way damaged in the handling of their commodity accounts." Id.* at 83. (Emphasis added). (Letter to the Committee from Department of Agriculture.)

Congress has also explicitly stated that the reparations procedure was created to "offset a suspected industry bias favoring the resolution of customer claims through arbitration," H.R. Rep. No. 1181, 95th Cong., 2d Sess. 91 (1978), thus casting further doubt on the theory that the procedure was intended to supplement private rights of action. Equally revealing is the Senate's belief that where futures associations adopt arbitration procedures, thus relieving contract markets of their duty to adopt similar procedures, "aggrieved customers

. . . would have their choice of seeking resolution of their claims through an association arbitration or reparations proceedings, or a Commission reparations proceeding," S. Rep. No. 95-850, *supra*, at 32. For present purposes it is significant that the "choice" does not include a private right of action.[19]

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19 The few comments relied upon by the majority as evidence of Congress' intent to approve a private right of action are also too vague and abstruse to entitle them to any appreciable weight. First, the majority overstates the significance of Chairman Poage's statement that the act "sets up new consumer protection features." 120 Cong. Rec. 10737 (April 11, 1974). It is not surprising that Chairman Poage used the term "new" to describe the Act's enforcement provisions, including the CFTC's authority to bring suits and levy civil penalties and the reparations procedure, since these provisions were "new." By the use of the term "new" Chairman Poage did not mean that the remedies were "in addition to" or "supplementary" to *implied private right of action*. At most he meant that the remedies were in addition to the express remedies already contained in the Act. Had he intended that these remedies supplement implied private rights of action, he would have said so directly, not through an ambiguous reference to "new" remedies.

Similarly, the majority places unjustified weight on two comments of Senator Talmadge on the Senate floor. On September 9, 1974, while discussing the exclusive jurisdiction provision, § 201 of the House bill, discussed more fully *infra*, he stated:

> "In establishing this Commission, it is the committee's intent to give it exclusive jurisdiction over those areas delineated in the act. This will assure that the affected entities—exchanges, traders, customers, et cetera—will not be subject to conflicting agency rulings. However, it is not the intent of the committee to exempt persons in the futures trading industry from existing laws or regulations such as the antitrust laws, nor for the Commodity Futures Trading Commission to usurp powers of other regulatory bodies such as those of the Federal Reserve in the area of banking or the Securities and Exchange Commission in the field of securities.
>
> "The vesting in the Commission of the authority to have administrative law judges and apply a broad spectrum of civil and criminal penalties is likewise not intended to interfere with the courts in any way. It is hoped that giving the Commission this authority will somewhat lighten the burden upon the courts, but the entire appeal process and the right of final determination by the courts are expressly preserved." 120 Cong. Rec. 3049.

(*Footnote continued*)

Moreover, in the case of contract markets an implied right to recover unlimited damages in a private civil

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The majority also errs in assuming that the first sentence of the second paragraph indicates that Congress approved private rights of action. That sentence refers to the "savings clause" added by Congress to the exclusive jurisdiction provision. Congress added that clause not to approve private rights of action but rather to insure that the exclusive jurisdiction granted to the CFTC would not interfere with federal court jurisdiction over such matters as antitrust suits and enforcement actions taken by other regulatory agencies or with state court jurisdiction over contract and common law claims. Senator Talmadge's later comments about the jurisdictional provision are fully consistent with that view. He further stated in pertinent part:

> "In addition, the conferees wished to make clear that nothing in the Act would supersede or limit the jurisdiction presently conferred on courts of the United States or any state. This Act is remedial legislation designed to correct certain abuses which Congress found to exist in areas that will now come within the jurisdiction of the Commodity Futures Trading Commission. Congress was aware that there have been ongoing efforts by various state and federal regulators to prevent some of these abuses. Accordingly, section 412 was included in the bill to make clear that all pending proceedings, including ongoing investigations, as well as court proceedings, should continue unabated by any provision of the Act. This also is necessary in order to prevent the creation of any regulatory gaps, particularly during the time between the adoption of this legislation and the full implementation of its provisions by the Commodity Futures Trading Commission. During the course of our deliberations, we learned, for example, that the SEC has a number of such matters currently under investigation. We would expect that those investigations will continue and any proceedings resulting therefrom will not be affected by the passage of this Act." 120 Cong. Rec. 34997 (Oct. 10, 1974).

Though the majority reads this language as approval of private rights of action, the paragraph read as a whole belies that interpretation. Nothing in the language even remotely refers to private rights of action. Instead, Senator Talmadge was focusing exclusively on the effect of the provision for exclusive jurisdiction on existing court actions brought by various regulatory agencies.

Thus, the second paragraph of Senator Talmadge's September 9, 1974, statement is easily explained. Given the grant of exclusive jurisdiction to the CFTC, it was indeed hoped that the load on the courts would be lightened. Yet, Senator Talmadge was also aware

action against such markets would be inconsistent with express limitations placed by Congress on the amount of civil penalties that might be assessed against a contract market: (1) a limitation of $100,000, and (2) an amount which will not "materially impair the contract market's ability to carry on its operations and duties," § 6b of Act, 7 U.S.C. § 13a.[20]

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that Congress did not intend to relieve the federal courts of the burden of hearing appeals of the reparations proceeding as well as antitrust and regulatory matters or to relieve the state courts of hearing contract and common law matters.

20 Moreover, when Congress in 1978 authorized states to bring actions in the federal courts either in law or equity or both against those who violate the Act, § 6d of the Act, 7 U.S.C. § 13a-2, it expressly exempted contract markets and floor brokers from liability, thus indicating an intent to lodge primary responsibility for the enforcement of the Act with the CFTC and to insulate contract markets and floor brokers from the large damage suits that arise out of private suits, including *parens patriae* suits. The majority argues that contract markets were excluded only because Congress was concerned about off-market abuses. I disagree. While Congress may well have been concerned about off-market abuses, the legislative history clearly demonstrates that Congress exempted contract markets not because of its concern about off-contract market abuses but because it desired the CFTC to retain exclusive jurisdiction over those markets in order to guarantee national uniformity in the development of standards governing commodity futures trading. Contrary to the majority's suggestion (footnote 35) there is a difference between the award of damages under § 14 and an award of damages in a private civil suit. In enacting the former, Congress may well have intended the CFTC in the first instance to develop some guidelines for the award of damages which would minimize the likelihood of inconsistent awards popping up around the country, as often happens in private civil suits.

The House Report, for example, stated "the Commission should continue to have sole authority for the creation of a nationally uniform body of standards governing activities relating to commodity futures trading," H.R. Rep. 95-1181, *supra*, at 14, and that with respect to § 6d "The power to enforce the requirements of the Act with respect to the organized exchanges remains solely with the Commission." *Id.* at 14. The Report concluded:

"The Committee views the creation of these rights of action in the States as a necessary supplement to the Commission's enforce-

Congress' complete failure to approve, much less to authorize, private rights of action when it exhaustively

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ment activities. In the event of a State suit, the Commission could intervene in the action or institute its own administrative disciplinary proceeding, or both, as would be the case if the Commission had initiated the action in Federal court." *Id.* at 14.

To insure that such actions would not proceed without the opportunity for CFTC involvement, Congress specifically required the States upon instituting any suit under § 6d to notify the CFTC and gave the CFTC the right to intervene. § 6d(2). The importance to Congress of assuring a nationally uniform body of standards is further emphasized by its refusal to permit the States to bring actions in State courts under State statutes identical to the Commodity Exchange Act. "The committee was concerned that, despite safeguards in the Act, the possibility existed that in time there would be separate bodies of State court decisions among the various States that would cause confusion and disruption among the regulated persons." *Id.* at 16.

The legislative history in the Senate, moreover, reinforces the view that Congress desired the CFTC to retain exclusive jurisdiction over contract markets. The Senate Report reads with respect to § 6d:

> "This authority is subject to the qualification that such State actions may not be brought against a contract market or floor broker designated or registered as such with the Commission. The intent of the section is to provide States with the tools to combat fraudulent and other unlawful activity directed at their residents. Plenary authority to register, regulate, and, discipline the contract markets and the 'locals' whose activities are generally of the character of pit trading rather than customer contact is reserved to the Commission." S. Rep. No. 95-850, *supra* at 27.

So concerned was the Senate Committee that the "body of decisional law developed under this section [§ 6d] would be coherent and consistent with national policy" that it required any State proceeding under § 6d to obtain approval from the CFTC, *id.* at 26, though the Senate later amended that section, requiring instead the notification procedure mentioned just above. Confirming the view that § 6d was a specific and limited exception to the general rule of CFTC exclusive jurisdiction, Senator Bellmon explained on the Senate floor why contract markets and brokers were excluded: "The Federal preemption doctrine has merit regarding the regulation of commodity markets and brokers. However, there is no justification for tying the hands of the States when they wish to stop fraudulent practices occurring within their borders." 124 Cong. Rec. S10561 (July 12, 1978). Contrary to the majority's suggestion (opinion, p. 63), the identity of the plaintiff in such action is quite relevant. In

analyzed, overhauled and amended the enforcement provisions of the Act refutes the majority's claim that it somehow or other affirmatively intended such rights to continue as a supplement to the battery of enforcement weapons provided by it. Had it desired or intended this, the logical and natural procedure would have been for it to say so. *SEC v. Sloan*, 436 U.S. 103, 122 (1977). No court has ever imposed on Congress the contrary duty, which the majority urges, of expressly stating that the remedies provided by it are exclusive.

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order to assure national uniformity, Congress permitted only the CTFC or the States, under limited circumstances, to bring suit, not private individuals.

In light of Congress' cautious and careful approach to *parens patriae* suits under § 6d, including the insulation of contract markets from those suits, it would be anomalous for Congress to have approved private suits against contract markets and floor brokers. It is unlikely that Congress would have required States to notify CFTC of any action brought under § 6d while at the same time permitting private suits to blossom all over the country without the CFTC's knowledge. *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 419, 420-21 n.13 (1974) ("anomalous for Congress to have centralized SEC suits [against the SIPC] for the apparent convenience of the SIPC while exposing the corporation to substantively identical suits by investors 'in any court, State or Federal' ").

The majority's reliance on the statement of Senator Leahy to the effect that contract markets were exempted from § 6d, in part because of the deterrent effect of private suits, 124 Cong. Rec. S16527 (Sept. 28, 1978), is misplaced. Since Congress was well aware by 1978 that the lower courts had begun to deny private rights of action under the Act, 124 Cong. Rec. S10537 (July 12, 1978) (Statement of Senator Huddleston), Senator Leahy's statement must be characterized as a hope and a prayer. Moreover, the explanation rings hollow since it would apply equally well to those traders subject to *parens patriae* suits who, under the view adopted by Senator Leahy at least, were also subject to private causes of action. Had Congress in fact believed that traders and contract markets were subject to private rights of action, it would have been far less likely to enact a *parens patriae* provision subjecting traders to suit by the States. Nor would it have been as concerned as it was about exempting contract markets from those suits.

Jurisdictional Provisions

The majority next contends that the "savings clause" incorporated into the jurisdictional provision, § 2 of the Act, 7 U.S.C. § 2 (§ 201 in the enacted bill), explicitly preserves the private right of action implied by the lower courts. Section 201 originated in H.R. 13113 and as passed by the House it read:

> "Provided, That the Commission shall have exclusive jurisdiction of transactions dealing in, resulting in, or relating to contracts of sale of a commodity for future delivery, traded or executed on a domestic board of trade or contract market or on any other board of trade, exchange, or market; And provided further, That nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission or other regulatory authorities under the laws of the United States or restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with the laws of the United States."

During the Senate hearings Rep. Rodino, Chairman of the House Committee on the Judiciary, criticized the provision not on the grounds that it might eliminate private rights of action but rather because the provision might be interpreted as eliminating the jurisdiction of state courts over contract claims and the jurisdiction of federal courts over antitrust claims and suits seeking review of administrative hearings. His comments are

set forth in full in the margin.[21] He accordingly suggested the addition of a proviso to the effect that federal courts should not be ousted of their jurisdiction. As a result the following proviso was enacted:

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21 Chairman Rodino's statement reads in relevant part:

"This double proviso could be construed to raise a question of federal pre-emption of the commodity futures industry and, therefore, unnecessarily raises a question of federal-State relationships. Many of the millions of commodity futures contracts are presently enforceable in State courts under recognized commercial law and contract principles. This double proviso could, in effect, deprive State courts of their current jurisdiction. There does not appear to be any legislative intention or established need to achieve this pre-emption. . . .

"In addition, this double proviso could possibly be read as an attempt to oust even federal courts of jurisdiction. The first proviso confers 'exclusive jurisdiction' on the Commission for commodity transactions. Exceptions to this exclusive jurisdiction are carved out in the second proviso without, however, referring to federal district courts. That such a result was not intended in the House is readily apparent from the House action striking the original antitrust exempting provision: antitrust laws are to apply to commodity transactions and, of course, federal courts play an instrumental role in promoting as well as protecting the national policies expressed already in the antitrust laws. Arguably, too, if jurisdiction of federal courts were to be withdrawn also, the Commission decisions on commodity transactions would be non-reviewable by the judiciary raising, thereby, serious questions of administrative and constitutional law.

"If it appears advisable to retain rather than to delete the double proviso of Section 201(B) of H.R. 13113, it would seem reasonable to amend the second proviso appropriately to define the jurisdiction, including antitrust jurisdiction, of federal courts for commodity transactions. In this regard, the second proviso could be amended to provide:

"And provided further, that Nothing therein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission or other regulatory authorities and on federal court. . . ." Commodity Futures Trading Commission Act: Hearings Before the Senate Committee on Agriculture and Forestry on S. 2485, S 2578, S. 2837 and H.R. 13113, *supra*, at 259-60.

> *And provided further*, That, except as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State.

Other witnesses reiterated Chairman Rodino's criticisms without any reference to private rights of action. Mr. Keith Clearwater, Deputy Assistant Attorney General, Dept. of Justice, for example, stated: "There are two problems with this language. It could be interpreted to deprive the Federal Courts of their jurisdiction under the antitrust laws and to deprive Federal and State courts of jurisdiction to enforce contract and commercial law rights." Commodity Futures Commission Act: Hearings Before the Senate Committee on Agriculture and Forestry on S. 2485, S. 2578, S. 2837 and H.R. 13113, *supra*, at 663. See Statements of James T. Halverson, Director of Bureau of Competition, Federal Trade Commission, *id.* at 667-68, and Statement of Glenn Willet Clark, Professor of Law, Drake University Law School, *id.* at 683-84.

The majority's contention that the "savings clause" explicitly preserves a private right of action rests solely on the comment of Senator Clark, while urging the Senate to authorize private treble damage suits, that "Unfortunately, the House bill does not authorize them,

but section 201 of that bill may prohibit all court actions. The staff has said that this was done inadvertently and they hope it can be corrected in the Senate." *Id.* at 205.

This "passing reference" by a "single legislator" is a slim reed on which to find congressional approval of a private right of action. *Consumer Product Safety Commission v. GTE Sylvania, Inc., supra,* 48 U.S.L.W. at 4662; *Piper v. Chris-Craft Industries, Inc., supra,* 430 U.S. at 31-32; *Chrysler Corp. v. Brown, supra,* 441 U.S. at 311; see *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 204 n.24 (1976). Senator Clark's concern that the House provision might prohibit "court actions" could well have been intended to refer to actions arising out of commodity contract claims. Moreover, applying the principles of *Chrysler Corp.,* his statement must be considered with the Reports of both Houses and the statements of other witnesses and Congressmen, all of which refute the majority's contention that there is a link between the jurisdictional provision of § 201 and Congress' attitude toward private rights of action.

Given the reasons expressly advanced by Chairman Rodino and given that no witness indicated that the revision of § 201 was intended to preserve or even affect any private rights of action in federal courts, the evidence is overwhelming that Congress simply took up the task of correcting the problem noted by Chairman Rodino and others and had no intention of approving a private damage action. Had Congress intended to preserve jurisdiction of the federal courts over private suits it could easily have said so, as it did in § 6c when it granted federal jurisdiction to hear CFTC-initiated injunctive suits, and in § 14(f) when it provided for such jurisdiction to enforce judgments arising out of reparations proceedings.

The Act does not have any counterpart to the jurisdictional provision of § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, which affirmatively grants to federal courts exclusive jurisdiction of violations of the Act and of its regulations and authorizes civil suits to be brought in the district where the defendant is found or resides. In any event the "savings clause" here, which was directed exclusively to jurisdictional matters, could not preserve private damage actions, since jurisdictional provisions cannot create such rights, *Redington, supra,* 442 U.S. at 577. "The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the [Act] which they seek to enforce, not in the jurisdictional provision." *Id.* at 577 (citing cases).

The 1978 Amendments

Finally, although subsequent legislation is of very limited weight in ascertaining Congress' intent in enacting earlier laws, *Transamerica, supra,* 100 S. Ct. at 248 n.13, the 1978 amendments are revealing. First, Congress did not provide expressly for a private right of action against merchants and exchanges despite its awareness that the lower courts had begun to deny private rights of action under the Act,[22] a situation

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22 The following cases, in addition to Judge MacMahon's opinion in this case, 470 F. Supp. 1256, have refused to imply a private cause of action under the Commodity Exchange Act: *Arkoosh v. Dean Witter & Co.*, 415 F. Supp. 535 (D. Neb. 1976), *affd. on other grounds*, 571 F.2d 437 (8th Cir. 1978); *Consolo v. Hornblower & Weeks-Hemphill, Noyes, Inc.*, 436 F. Supp. 477 (D. Ohio 1976), *Bartels v. International Commodites Corp.*, 435 F. Supp. 865 (D. Conn. 1977); *Berman v. Bache Halsey Stuart, Shields, Inc.*, 467 F. Supp. 311 (S.D. Ohio 1979); *Alkan v. Rosenthal & Co.*, CCH Comm. Fut. L. Rep. Par. 20,797 (S.D. Ohio 1979); *Liang v. Hunt*, 477 F. Supp. 891 (N.D. Ill. 1979); *Fischer v. Rosenthal & Co.*, 481 F. Supp. 53 (N.D. Tex. 1979); *Stone v. Saxon and Windsor Group, Ltd.*, CCH Comm. Fut. L. Rep. Par. 31,100 (N.D. Ill. 1980).

which Sen. Huddleston on the floor of the Senate deemed "unfortunate." 124 Cong. Rec. 10537 (July 12, 1978). Instead, Congress proposed to alleviate the heavy burden on the reparations procedure caused by the failure of lower courts to imply private rights of action not by amending the Act to allow private suits, as we would expect if it had approved of private suits, but rather by eliminating the hearing requirement for reparations claims under $5,000. § 14(b), 7 U.S.C. § 18(b).

The failure of Congress to amend the Act is particularly significant in light of its awareness by that time of the Supreme Court's recent but well publicized adoption of somewhat stricter principles governing the implication of private causes of action. See *Amtrak*, 414 U.S. 453 (1974); *Cort v. Ash*, 422 U.S. 66 (1975); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975); *Piper v. Chris-Craft Industries*, 430 U.S. 1 (1977); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).[23]

Second, Congress in 1978 received testimony from the states that they were uncertain, in light of various adverse court decisions, about their ability to bring *parens patriae* suits for violations of the Act and to enforce their own contract and consumer fraud statutes. In sharp contrast to its 1974 refusal to authorize private suits, Congress expressly empowered the states to bring suits in federal courts to enjoin violations of the Act or to obtain monetary damages,

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23 The majority responds that Congress' omission is not significant, reasoning that Congress could not have been aware in 1978 of the Supreme Court's retreat from a liberal view of implied rights of action). But, as the Court recognized in *Cannon*, *supra*, 442 U.S. at 698, *Cort v. Ash* and other cases decided prior to 1978 had signaled a stricter approach.

§ 6d, 7 U.S.C. § 13a-2, and expressly confirmed the ability of the states to enforce their contract and consumer fraud law. § 6d(5), 7 U.S.C. § 13a-2(5). Quite apart from the fact that Congress' express exemption of contract markets and floor brokers from liability under § 6d suggests a desire to insulate those participants from private damage liability,[24] the adoption of § 6d is a clear indication that "Congress knew how to confer a private right of action when it wished to do so." *Transamerica, supra,* 100 S. Ct. 248 at n.13. Moreover, Congress recognized that express authorization for such suits was necessary if a right under the Act to institute such litigation was to exist:

> "Section 12 specifically authorizes the States to investigate or prosecute in a civil action violations of the Act. . . . Any such action must be brought in the proper Federal district court, and the Commission is given the right to intervene in the action as a party. *This is a new right since States currently have no such express authority under the Act.*" H.R. Rep. No. 95-1181, *supra,* at 28.

This statement is strong evidence that when Congress intended to create a right of action under the Act it did so expressly, not by implication.[25]

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24 See *supra* note 20.

25 Equally telling is the complete absence of any mention of a private right of action in the exhaustive Senate and House Committee Reports on the 1978 amendments, which purported to list all of the private remedies available under the Act. S. Rep. No. 95-850, *supra,* at 12-13; H.R. Rep. No. 95-1181, *supra,* (158 pages discussing the Act, its history and its enforcement provisions without a mention of private rights of action). This conspicuous omission suggests, of course, that Congress did not believe a private right of action to be available.

The Theory that Congressional Silence Amounts to Congressional Approval

Lacking any substantial support in the language or legislative history of the Act that Congress affirmatively approved private rights of action, the majority's position boils down to the theory that Congress must have been aware generally of a few lower federal court decisions implying a private right under the Act as it stood prior to 1974 and therefore found express approval of private rights unnecessary. But bearing in mind that "[i]mplying a private cause of action on the basis of Congressional silence is a hazardous enterprise, at best," *Redington, supra*, 442 U.S. at 571, any leap from congressional silence to congressional approval must be made cautiously, if at all. Moreover, it is inappropriate to rely on the presumption asserted by the majority where, as here, Congress has expressly created a number of remedies which may reasonably be viewed as exclusive and where, if Congress intended to adopt a prior judicial interpretation providing for an additional remedy, it would have said so. Finally, the body of earlier lower federal court decisional law provides a wholly inadequate basis, either in terms of relevance, weight, period of existence, or notoriety, for such an inference.

In *T.I.M.E. v. United States, supra*, 359 U.S. 464, the Court expressly rejected the position advanced by the majority here. There a shipper of goods contended that it had a private cause of action under the Motor Carrier Act to recover unreasonable rates charged by a carrier in violation of the Act. After rejecting the contention that the Act granted a private right of action, in part because, as here, Congress specifically declined to enact a proposed cause of action, the Court rejected the claim

that the Act must be read as preserving a pre-existing common-law or judicially implied right of action.

> "The Government is able to point to only two cases in addition to the present ones, in the 24 years since passage of the Motor Carrier Act, in which courts have appeared to assume that the issue of reasonableness of past motor carrier rates was litigable, and in neither of these cases was the question given other than the most cursory attention. Under these circumstances the issue before us cannot fairly be said to be foreclosed by long-standing interpretation and understanding.
>
> "We are told that Congress has long been aware that the Commission was of the view that a common-law action for recovery of unreasonable rates paid to a motor carrier, with referral to the Commission of the issue of unreasonableness, would lie, and that its failure to legislate in derogation of this view implied an approval and acceptance of it. But it appears that each time the Commission's views in this regard were communicated to committees of Congress, it was in connection with a request by the Commission for legislation which would have given to shippers a cause of action under the statute and granted to the Commission the authority to award reparations, and each time that request was rejected. . . . *[W]e do not think that from the failure of Congress to grant a new authority any reliable inference can permissibly be drawn to the effect that any authority previously claimed was recognized and confirmed.*" 359 U.S. at 478. (Emphasis added).

The few decisions relied upon by the majority are consistent with the foregoing, since they involved exceptionally long periods of continuous construction and not, as here, an interpretation by a lower federal court, the Seventh Circuit in *Deaktor*, less than a year old. In *Blue Chip Stamps v. Manor Drug Stores, supra*, 421 U.S. at 733, the Court found that a *24-year old* acceptance by the lower courts of an interpretation of §10(b) limiting the cause of action to purchasers of securities, coupled with the failure of Congress to reject that interpretation, despite the Securities and Exchange Commission's repeated urging, "argues significantly in favor of acceptance" of that interpretation. In *Cannon, supra*, 441 U.S. 677, the Court, in implying a cause of action under Title IX of the Education Amendments of 1972, noted that Congress intended to create remedies under Title IX similar to those available under Title VI and found that Congress understood that the courts had implied a right of action for plaintiffs under Title VI. The Court, however, specifically disclaimed reliance on the presumption used by the majority here—that the private right of action must be presumed to exist unless expressly repealed by Congress—and instead rested its decision on what it considered to be Congress' affirmative intent to create a private right of action. *Id.* at 699.

Similarly in *SEC v. Sloan, supra*, 436 U.S. 103, the Court rejected the argument that Congress should be presumed to have approved a long-standing administrative construction of a statute despite Congress' re-enactment of the statute without disapproval of the interpretation and the fact that on at least one occasion the relevant Senate Committee indicated that it understood and approved the interpretation. The Court

noted that "we are extremely reluctant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents. That language in a Committee Report, without additional indication of more widespread congressional awareness, is simply not sufficient to invoke the presumption in a case such as this." *Id.* at 121. The Court concluded that if Congress intended to approve the prior interpretation it could have and would have said so. This principle applies with equal force in the present case.

The cases cited by the majority are not to the contrary. In *Lorillard v. Pons*, 434 U.S. 575 (1978), the Court found that Congress, in enacting the Age Discrimination Employment Act (ADEA) and in incorporating a number of provisions from the Fair Labor Standards Act (FLSA), intended to adopt the judicial construction of those provisions. The Court noted that because Congress exhibited a detailed knowledge of the FLSA provisions and their interpretations and a willingness to depart from those interpretations with which it disagreed, it was fair to presume that, but for the changes made in the FLSA provisions, Congress intended to incorporate fully all other remedies and interpretations of the FLSA. This is quite different from the situation in the present case where the references to the prior judicial interpretation are few and far between in the legislative history and where Congress dos not exhibit detailed knowledge of that interpretation.

Reliance on *Georgia v. United States*, 411 U.S. 526 (1978), is similarly misplaced. The Court found congressional acquiescence in a prior Supreme Court

decision to be persuasive only after noting that the decision was repeatedly discussed by members of Congress. Indeed, discussion of the decision took up approximately 73 pages in the House Hearings and 10 in the Senate, *id.* at 533 n.5.[26]

All of these authorities are a far cry from the inference as to congressional intent which we are asked to draw in this case. As in *SEC v. Sloan*, reliance is placed on a few scattered undefinitive and conclusory references in thousands of pages of legislative history rather than upon repeated detailed reference to any identified Supreme Court decisions, such as existed in *Georgia*. Unlike the 25-year history of interpretation of § 10(b), with which the Supreme Court was faced in *Superintendent of Insurance* and *Blue Chip Stamps*, we find a brief line of lower court decisions, none of which are relevant to the issues before us except one, decided *only one year* before the 1974 amendments, *Deaktor*, knowledge of which by Congress cannot be presumed. This hardly constitutes a long-standing and well-recognized prior judicial interpretation sufficient to invoke the dubious presumption relied on by the majority here. The silence of the 1975 Congress when it amended the Securities Exchange Act (see majority

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26 The other cases cited by the majority are likewise easily distinguishable. In the first place, none of them involves private rights of action and we have been instructed by the Supreme Court to go slow in inferring that Congress by its silence intended to approve a private right of action. *Redington, supra*, 442 U.S. at 571. Second, the cases all involve situations where the prior judicial interpretation is far more longstanding and pervasive than the one year old history of *Deaktor* here, see, e.g., *Van Franken v. Helvering*, 115 F.2d 709 (2d Cir. 1940), *cert. denied*, 313 U.S. 585 (1941), and *Electric Storage Battery Co. v. Shimadzu*, 307 U.S. 5 (1930), or where, unlike the situation here, there have been numerous specific references in the legislative history to the prior interpretation. *Bennett v. Panama Canal Co.*, 475 F.2d 1280 (D.C. Cir. 1973).

opinion, *supra*, p. 33) in the face of *Supreme Court decisions* (e.g., *Superintendent of Insurance* and *Blue Chip Stamps* upholding implied rights of action) is quite different from silence in the face of *one lower court decision (Deaktor)*, of which it may not even have had knowledge. No court has yet found a private cause of action based on §§ 5d, 5a(8) or 4a of the Act, which are invoked on this appeal.

Lastly, since it is abundantly clear that the few pre-1974 decisions were erroneous, being based on the theory of tort rather than congressional intent, it is unreasonable to suppose that Congress, absent a Supreme Court ruling, intended to compound the error by tacitly giving effect to them. Cf. *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5 (1978); *SEC v. Sloan, supra*, 436 U.S. at 116 (holding that the interpretations of an administrative agency as to its statutory authorization is entitled to deference only when thoroughly and soundly reasoned). By 1974 the Supreme Court with its decision in *Amtrak* had signaled a somewhat stricter approach to the implication of private rights of action, putting Congress on notice that the basic principles of construction by which private rights were to be implied was not yet finally settled.

In the last analysis the majority substitutes sheer speculation based on unsupportable presumptions for reasonable evidence of Congress' contrary intent. The issue was squarely presented to Congress in 1974 but it failed to approve an express right of action much less indicate in a long legislative history any approval of an implied one. "We are not obliged to indulge Congress in its refusal to confront the hard questions of private rights of action," *Cannon, supra*, 441 U.S. at 743 n.14

(Powell, J., dissenting). Under these circumstances, absent some expression of approval by Congress, formal or informal, I believe we should not imply an intent on its part to create an implied right of action. Under these circumstances, creation of a private right rests with Congress, not the judiciary.

APPENDIX B

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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76 Civ. 2375 (LFM), 76 Civ. 2554 (LFM),
76 Civ. 2571 (LFM), 76 Civ. 2594 (LFM)

NATIONAL SUPER SPUDS, INC. et al.,

Plaintiffs,

—against—

NEW YORK MERCANTILE EXCHANGE et al.,

Defendants.

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76 Civ. 2648 (LFM)

INCOMCO,

Plaintiff,

—against

NEW YORK MERCANTILE EXCHANGE et al.,

Defendants.

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76 Civ. 3210 (LFM)

HOWARD BERENSON,

Plaintiff,

—against—

JOHN RICHARD SIMPLOT et al.,

Defendants.

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76 Civ. 4350 (LFM)

NEIL LEIST et al.,

Plaintiffs,

—against—

JOHN RICHARD SIMPLOT et al.,

Defendants.

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76 Civ. 5200 (LFM)

DEXTER RICHARDS,

Plaintiff,

—against—

NEW YORK MERCANTILE EXCHANGE et al.,

Defendants.

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MacMahon, *District Judge.*

Defendants, the New York Mercantile Exchange (the "Exchange"), Richard Levine ("Levine"), Howard Gabler ("Gabler"), Alfred Pennisi ("Pennisi"), Clayton Brokerage Co. of St. Louis, Inc. ("Clayton"), Heinold Commodities, Inc. ("Heinold") and Thomson & McKinnon Auchincloss Kohlmeyer, Inc. ("Thomson"), move under Rule 12(c), Fed.R.Civ.P., for judgment on the pleadings, or, in the alternative, under Rule 56(b), Fed.R.Civ.P., for partial summary judgment dismissing all or part of the complaints against them in these related actions.[1] Since

[1] The Exchange moves in the following actions: *National Super Spuds, Inc. v. New York Mercantile Exchange*, 76 Civ. 2375, 76 Civ. 2554, 76 Civ. 2571, 76 Civ. 2594 (the "consolidated class ac-

all parties have submitted factual material outside the pleadings, we treat the motions as motions for partial summary judgment.

These actions arise out of the much publicized default in May 1976 of Maine potato futures contracts,[2] when the sellers of almost 1,000 contracts failed to deliver approximately 50,000,000 pounds of potatoes, resulting in the largest default in the history of commodities futures trading in this country. The primary claim in these actions is that the default was caused by certain defendants' price manipulation.

In order to understand these motions, a basic understanding of the commodities futures industry is essential. A commodity future is a contract for the future delivery of a certain commodity. Except for price, all the terms of the contracts for a given commodity traded on an exchange are standardized and, thus, the contracts are fungible. The actual trading of futures is done by futures commission merchants and floor brokers, both of whom must be registered with the Commodities Futures Trading Commission

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tions"); *Incomco* v. *New York Mercantile Exchange*, 76 Civ. 2648; and *Leist* v. *Simplot*, 76 Civ. 4350.

Levine, Gabler and Pennisi move in *Leist* v. *Simplot*, 76 Civ. 4350.

Clayton moves in the consolidated class actions and in *Leist* v. *Simplot*, 76 Civ. 4350.

Heinold and Thomson move in the consolidated class actions, in *Berenson* v. *Simplot*, 76 Civ. 3210, and in *Leist* v. *Simplot*, 76 Civ. 4350.

The motions of the Exchange, Levine, Clayton, Heinold and Thomson in *Richards* v. *New York Mercantile Exchange*, 76 Civ. 5200, are denied as moot because this action was discontinued after these motions were filed.

The motions of the Exchange and Clayton in *Berenson* v. *Simplot*, 76 Civ. 3210, are also denied as moot because this action has been discontinued as to the Exchange and Clayton.

[2] See N.Y. Times, May 26, 1976, at 1, col. 1.

(the "CFTC").[3] Additionally, trading may take place only on exchanges which have complied with certain statutory requirements and have been designed as "contract markets" by the CFTC.[4]

A seller of a futures contract is, in the language of the trade, in a "short" position, that is, he is obligated to deliver the commodity at a future date in return for the right to receive the purchase price. Conversely, a buyer of a futures contract is said to be in a "long" position, that is, he is obligated to pay the purchase price in return for the right to receive the commodity. As a practical matter, however, physical delivery of the commodity is made on only a small fraction of the futures contracts traded on the nation's exchanges. Most of the trades are made by speculators who have no intention of delivering or receiving the actual commodity. As the last day of trading in a particular contract approaches, a speculator in a short position (a seller) will cover his obligation to deliver by buying a contract. Similarly, a speculator in a long position (a buyer) will cover his obligation to pay by selling a contract.[5]

Plaintiffs, traders and a dealer in potatoes, were buyers holding long positions in May 1976 Maine potato futures contracts. They allege that Clayton, Heinold and Thomson, futures commission merchants, conspired with certain of their customers to manipulate and depress the price of the May contract by selling an illegally large number of May contracts, thereby causing plaintiffs to sell their contracts and potatoes at an artificially depressed price.

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[3] 7 U.S.C. §§ 6d, 6e, 6f.

[4] 7 U.S.C. §§ 6, 7.

[5] The commodities futures industry is described in more detail in S. Angrist, Sensible Speculating in Commodities (1972) and S. Kroll & I. Shishko, Commodity Futures Market Guide (1973).

Plaintiffs contend that the actions of Clayton, Heinold and Thomson violated the Commodities Exchange Act[6] (the "Act"), various regulations promulgated thereunder,[7] and Sections 1 and 2 of the Sherman Act.[8] Plaintiffs also contend that the Exchange, a designated contract market, and its officers, Levine, Gabler and Pennisi, are liable to them for failure to take steps to prevent the downward price manipulation by the other defendants, and that the Exchange conspired with the other defendants to manipulate the price.

Specifically, plaintiffs allege that the Exchange and its officers failed to report and concealed violations of the Act and the regulations promulgated thereunder; that the Exchange and its officers violated the Act by failing to enforce its own rules, the Act and the CFTC's regulations; and that the Exchange violated Sections 1 and 2 of the Sherman Act.

Implied Right of Action

All moving defendants contend that they are entitled to partial summary judgment because there is no private right of action against them under the Act. Concededly, such a right of action existed prior to 1974,[9] but, in that

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[6] 7 U.S.C. § 1 et seq.

[7] Plaintiffs also allege violations of the Exchange's rules. Because the obligation to obey these rules arises under the CFTC's regulations, we consider these claims as alleging violations of the CFTC's regulations.

[8] 15 U.S.C. §§ 1, 2.

[9] *E.g., Deaktor* v. *L.D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973); *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440 (N.D. Ill. 1967).

year, the Act was amended extensively,[10] and the question before us is whether the private right of action has survived the 1974 amendments to the Act.

Although a number of other district courts have considered this question, there is no clear consensus on the answer.[11] This difference of opinion and the importance of the question to the future course of these actions compel us to resolve the question ourselves.

Under *Cort* v. *Ash*,[12] four factors are relevant in determining whether a private right of action may be implied under a federal statute which does not expressly provide for one:

> "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . . that is,

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[10] Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (codified at 7 U.S.C. § 1 et seq.). The Act was further amended in 1978. Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865 (codified at 7 U.S.C. § 1 et seq.).

[11] Nine cases have stated that a private right of action exists under the Act: *R.J. Hereley & Son* v. *Stotler & Co.*, Comm. Fut. L. Rep. (CCH) ¶ 20,773 (N.D. Ill. 1979); *Smith* v. *Grover*, No. 77 C 2297 (N.D. Ill. Feb. 2, 1979); *Gravois* v. *Fairchild, Arabatzis & Smith, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 20,706 (E.D. La. 1978); *Berenson* v. *Madda Trading Co.*, No. 78-544 (D.D.C. Oct. 30, 1978); *Hoffmayer* v. *Dean Witter & Co.*, Comm. Fut. L. Rep. (CCH) ¶ 20,694 (N.D. Cal. 1978); *Kelley* v. *Carr*, 442 F. Supp. 346 (W.D. Mich. 1977); *Bache Halsey Stuart, Inc.* v. *French*, 425 F. Supp. 1231 (D.D.C. 1977); *Shearson Hayden Stone, Inc.* v. *Lumber Merchants, Inc.*, 423 F. Supp. 559 (S.D. Fla. 1976); *Milani* v. *Conticommodity Serv., Inc.*, 462 F. Supp. 405 (N.D. Cal. 1976).

Five cases have stated that no private right of action exists under the Act: *Alkan* v. *Rosenthal & Co.*, Comm. Fut. L. Rep. (CCH) ¶ 20,797 (S.D. Ohio 1979); *Berman* v. *Bache Halsey Stuart, Shields, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 20,796 (S.D. Ohio 1979); *Bartels* v. *International Commodities Corp.*, 435 F. Supp. 865 (D. Conn. 1977); *Consolo* v. *Hornblower & Weeks-Hemphill, Noyes, Inc.*, 436 F. Supp. 447 (D. Ohio 1976); *Arkoosh* v. *Dean Witter & Co.*, 415 F. Supp. 535 (D. Neb. 1976), *aff'd on other grounds*, 571 F.2d 437 (8th Cir. 1978).

[12] 422 U.S. 66 (1975).

> does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? . . ." [13]

There can be no question that plaintiffs, investors in the commodities market and a dealer in potatoes, are within the class "for whose especial benefit the statute was enacted." As Senator Dole stated, the primary purposes of the 1974 amendments to the Act were "[to protect] against manipulation of markets and to protect any individual who desires to participate in futures market trading." [14] Additionally, the Act itself states that price manipulation and unreasonable fluctuations in price "are detrimental to . . . persons handling the commodities." [15]

Thus, we find that the first element of the *Cort* test is satisfied.

The second element of the *Cort* test, congressional intent, is more troublesome. The 1974 amendments to the Act established an administrative procedure under which "[a]ny person complaining of any violation of any provision of this chapter or any rule, regulation, or order thereunder by any person who is registered or required to

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[13] *Id.* at 78 (citations omitted).

[14] 120 Cong. Rec.-Senate 30466 (1974) (remarks of Sen. Dole); accord 120 Cong. Rec.-Senate 34998-99 (1974) (remarks of Sen. Clark). See also *Ames* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1179 (2d Cir. 1977).

[15] 7 U.S.C. § 5.

be registered under . . . this title may" [16] commence an administrative proceeding before the CFTC to recover reparations. Judgments resulting from these reparation proceedings are subject to judicial review by the courts of appeal[17] and may be enforced in the district courts.[18]

The 1974 amendments also give the CFTC plenary power over futures commission merchants and contract markets. The CFTC may suspend or revoke the registration of a futures commission merchant or the designation of a contract market.[19] The CFTC is also authorized to issue cease and desist orders against contract markets[20] and to assess civil penalties of up to $100,000 against futures commission merchants and contract markets.[21] Finally, the CFTC or the Attorney General, at the request of the CFTC, is authorized to bring an action in the district courts against futures commission merchants and contract markets for a restraining order, an injunction or a writ of mandamus to compel compliance with the Act and the regulations thereunder.[22]

We believe that under the maxim of "*expressio unius est exclusio alterius*," [23] the establishment of administrative

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[16] 7 U.S.C. § 18(a).

[17] 7 U.S.C. § 18(g).

[18] 7 U.S.C. § 18(f).

[19] 7 U.S.C. §§ 7b, 9.

[20] 7 U.S.C. § 13a.

[21] 7 U.S.C. §§ 9, 13a.

[22] 7 U.S.C. § 13a-1. The 1978 amendments to the Act added a provision by which a state may bring an action under the Act on behalf of its citizens. 7 U.S.C. § 13a-2.

[23] Expression of one thing is the exclusion of another. See *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 419 (1975); *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974); *Redington* v. *Touche Ross & Co.*, 592 F.2d 617, 629-30 (2d Cir.) (Mulligan, J., dissenting), *cert. granted*, 47 U.S.L.W. 3368 (U.S. Nov. 27, 1978) (No. 78-309).

reparation proceedings and the plenary grant of disciplinary and regulatory power to the CFTC evidences a congressional intent to deny a private right of action under the Act. This conclusion is reinforced by the fact that Congress was informed of the need for a private right of action under the Act[24] but rejected a bill which would have expressly established such a right of action.[25]

Thus, we conclude that Congress did not intend that there be a private right of action under the Act.

The third element of the *Cort* test, whether the implication of a private right of action would be consistent with the underlying purposes of the Act, also weighs against the implication of such a right. As applied by the Supreme Court, this element of the *Cort* test is satisfied when the implication of a private right of action is necessary in order to further the purposes of the statute in question.[26]

Contract markets, such as the Exchange, are not registered persons under the Act, and, thus, they are exempt from the administrative reparation proceeding established by the Act. The CFTC alone has the right to assess a monetary civil penalty against a contract market, and the Act imposes two limitations on the amount of the civil penalty which may be assessed against a contract market. First, there is an overall limitation of $100,000.[27] Second,

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[24] Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 before the Senate Committee on Agriculture and Forestry, 93d Cong., 2d Sess. pt. 3, 737, 746 (1974) (testimony of Prof. Roy A. Schotland).

[25] S. 2837, 93d Cong., 1st Sess. § 505(a) (1973). This bill provided for actual damages for non-wilful violations of the Act and treble damages for wilful violations.

[26] *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 39-40 (1977); *Cort* v. *Ash, supra*, 422 U.S. at 84; *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964); Comment, Implying Private Causes of Action from Federal Statutes, 17 Boston Col. Indus. & Com. L. Rev. 53, 69 (1975).

[27] 7 U.S.C. § 13a.

the CFTC is required to consider "whether the amount of the penalty will materially impair the contract market's ability to carry on its operations and duties." [28] We believe that both of these limitations evidence a congressional intent to limit the potential monetary exposure of contract markets. Since neither of these limitations would be present in private actions against contract markets, the implication of a right of action against contract markets would be inconsistent with the manifest intent of Congress to limit the potential monetary liability of contract markets.

Additionally, the implication of a private right of action against futures commission merchants would not be consistent with the Act because it is not necessary to further the purposes of the Act. Since there is no dispute that futures commission merchants, such as Clayton, Heinold and Thomson, are subject to the administrative reparation proceedings mentioned above,[29] there is plainly no necessity to imply a right of action to remedy injuries which are fully compensable in administrative proceedings.

Thus, we conclude that implication of a private right of action under the Act would not be consistent with the underlying purposes of the Act.

The fourth element of the *Cort* test, whether the implication of a private right would infringe on an area of state concern, favors the implication of such a right since it is well settled that the regulation of commodity futures trading is essentially a matter of federal concern.[30]

Thus, our application of the *Cort* test leads us to conclude that there is no private right of action under the

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[28] *Id.*

[29] See text accompanying notes 16-18, *supra*.

[30] See *e.g. Smith* v. *Grover, supra,* slip op. at 18-19; *Gravois* v. *Fairchild, Arabatzis & Smith, Inc., supra,* Comm. Fut. L. Rep. (CCH) ¶ 20,706 at 22,873.

Act because the two critical elements of the test,[31] congressional intent and consistency with the statutory scheme, weigh strongly against the implication of such a right.

Plaintiffs contend that the implication of a private right of action under the Act is compelled by those cases which have implied private rights of action under the Securities Exchange Act of 1934.[32] Although we agree with plaintiffs that there are some similarities between the commodity futures industry and the securities industry, we find that the respective statutory schemes are significantly different. First, the Securities Exchange Act does not provide any administrative remedy to defrauded investors as does the Commodities Exchange Act. Second, the Securities Exchange Act does not grant the SEC the same plenary powers that the Commodities Exchange Act gives the CFTC.[33] Finally, the Commodities Exchange Act contains no counterpart to the Securities Exchange Act's specific grant of jurisdiction to the district courts over violations of that Act,[34] which the Supreme Court found of

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[31] See *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers, supra,* 414 U.S. at 457-58.

[32] 15 U.S.C. § 78a et seq.

[33] The SEC's power over brokers, dealers and securities exchanges is limited to suspension or revocation of their registration. 15 U.S.C. §§ 78o(b)(4), 78s(h). The SEC may also seek to enjoin brokers, dealers and securities exchanges from violating the Security Exchange Act. 15 U.S.C. § 78u.

[34] 15 U.S.C. § 78aa provides, in pertinent part, that:

> "The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder."

Although 7 U.S.C. § 13a-2(2) closely resembles the language quoted above, its reach is expressly limited to actions brought by state attorneys general.

critical importance when it implied private rights of action under that Act.[35]

Plaintiffs also argue that the CFTC interprets the Act as allowing private rights of action[36] and that the CFTC's interpretation is entitled to "'great deference.'" [37] However, as the Supreme Court has recently stated, the administrative deference rule is not applicable where the "narrow legal issue is one particularly reserved for judicial resolution, namely whether a cause of action should be implied by judicial interpretation in favor of a particular class of litigants." [38]

Finally, we note that the Supreme Court's recent decision in *Cannon* v. *University of Chicago*[39] is readily distinguishable from this case. In *Cannon*, the Supreme Court implied a private right of action for a victim of alleged sex discrimination under Title IX of the Education Amendments of 1972,[40] despite the existence of an administrative procedure to enforce those amendments. However, the only administrative remedy under Title IX is the termination of federal grants to educational institutions which discriminate on the basis of sex. Thus, the Supreme Court found that Title IX provided no private administrative remedy to victims of sex discrimination.[41] In contrast,

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[35] *Securities Investor Protection Corp.* v. *Barbour*, *supra*, 421 U.S. at 424; *J.I. Case Co.* v. *Borak*, *supra*, 377 U.S. at 430-31.

[36] Amicus Curiae Brief of the Commodities Futures Trading Commission submitted in *Smith* v. *Grover*, *supra*.

[37] *United States* v. *Consumer Life Ins. Co.*, 430 U.S. 725, 752 (1977) (citations omitted).

[38] *Piper* v. *Chris-Craft Indus., Inc.*, *supra*, 430 U.S. at 41 n.27.

[39] 47 U.S.L.W. 4549 (U.S. May 14, 1979) (No. 77-926).

[40] 20 U.S.C. §§ 1681-1686.

[41] See 47 U.S.L.W. at 4556.

the reparations procedure available under the Commodities Exchange Act provides a remedy directly for the benefit of private parties injured by violations. Thus, unlike *Cannon*, the implication of a right of action here is not necessary to provide a plenary remedy to the intended beneficiaries of the Act.

Cannon is also distinguishable for a second reason. In *Cannon*, the Supreme Court noted that Title IX was enacted in 1972 when the Court had been rather liberal in finding implied rights of action. The Court found that Congress expected Title IX to be interpreted in accordance with that liberal view.[42] The Commodities Exchange Act, on the other hand, was reconsidered by Congress as recently as last year when the Supreme Court had retreated from its liberal view toward implied rights of action.[43] Yet, in enacting the 1978 amendments to the Act, Congress again failed to add a section expressly providing for a private right of action despite knowledge that a number of district courts had held that the private right of action previously implied did not survive the 1974 amendments.[44] *Cannon* teaches that the failure of Congress to provide for a private right of action must be viewed in light of the judicial attitude toward such rights at the time of enactment. In light of that teaching, the failure of Congress to provide for a private right of action in the 1978 amendments evidences an intent to deny such a right.

Thus, we conclude that there is no private right of action against futures commission merchants and contract markets under the Act. Since there is no private right of action under the Act, it necessarily follows that there is no private

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[42] *Id.* at 4554.

[43] *Id.*

[44] 124 Cong. Rec.-Senate 10537 (remarks of Sen. Huddleston).

right of action under the regulations promulgated pursuant to the Act.[45]

ANTITRUST CLAIMS

Clayton and Heinold also move for summary judgment on the antitrust claims, asserting that there is no genuine issue of fact that they did not intend to manipulate the price of May 1976 Maine potato futures contracts.

A party seeking summary judgment bears the burden of demonstrating the absence of any genuine issue of fact,[46] even when the motion is unopposed.[47] Clayton and Heinold have submitted excerpts of deposition testimony given by certain of their employees. Although this testimony does tend to show that Clayton and Heinold lacked the intent required for a violation of the Sherman Act, it is neither conclusive nor sufficiently clear to allow us to conclude that there is no genuine issue of fact. Clayton's employee, Delbridge, admitted that Clayton took no steps to investigate its clients' ability to deliver despite their large short position, and Heinold's vice-president, Klopfenstein, admitted that Heinold did not take the steps that it normally would have taken to ensure that its short customers could deliver. Given the elusive nature of intent and its significance to an antitrust violation,[48] we cannot say that there is no issue of fact regarding Clayton's and Heinold's knowledge and intent.[49]

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[45] *Crane Co.* v. *American Standard, Inc.*, No. 77-7517, slip op. at 2019 n.11 (2d Cir. Apr. 4, 1979).

[46] *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

[47] *Id.* at 160.

[48] See *United States* v. *United States Gypsum Co.*, 98 S. Ct. 2864 (1978).

[49] See *SEC* v. *Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978) ("[S]ummary judgment is likely to be inappropriate when the issues concern intent.").

Accordingly:

1. There being no just reason for delay, the Clerk of the court is directed, pursuant to Rule 54(b), Fed.R.Civ.P., to enter final judgment:

A. In favor of the Exchange on its motions for partial summary judgment on the sixth claim of the first amended consolidated class action complaint in *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 76 Civ. 2375, 76 Civ. 2554, 76 Civ. 2571 and 76 Civ. 2594; the first and fourth claims of the complaint in *Incomco* v. *New York Mercantile Exchange*, 76 Civ. 2648; and the fourth claim of the complaint in *Leist* v. *Simplot*, 76 Civ. 4350;

B. In favor of Levine, Gabler and Pennisi on their motion for summary judgment on the fourth claim of the complaint in *Leist* v. *Simplot*, 76 Civ. 4350;

C. In favor of Clayton on its motions for partial summary judgment on the fourth claim of the first amended consolidated class action complaint in *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 76 Civ. 2375, 76 Civ. 2554, 76 Civ. 2571 and 76 Civ. 2594; and the first claim of the complaint in *Leist* v. *Simplot*, 76 Civ. 4350;

D. In favor of Heinold and Thomson on their motions for partial summary judgment on the fourth claim of the first amended consolidated class action complaint in *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 76 Civ. 2375, 76 Civ. 2554, 76 Civ. 2571 and 76 Civ. 2594; the first claim of the complaint in *Leist* v. *Simplot*, 76 Civ. 4350; and the second claim of the complaint in *Berenson* v. *Simplot*, 76 Civ. 3210, to the extent that it asserts a claim under the Act.

2. Clayton's and Heinold's motions for summary judgment in their favor on all other claims against them are denied in all respects.

So ordered.

Dated: New York, N.Y.
May 29, 1979

/s/ Lloyd F. MacMahon
Lloyd F. MacMahon
United States District Judge

APPENDIX C

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of July, one thousand nine hundred and eighty.

79-7402, 79-7464, 79-7482

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs-Appellants,

—v.—

JOHN RICHARD SIMPLOT, J.R. SIMPLOT & Co., et al.,

Defendants,

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES INC., *et al.*,

Defendants-Appellees.

Present:

HON. HENRY J. FRIENDLY,
HON. WALTER R. MANSFIELD,
HON. AMALYA L. KEARSE,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed in accordance with the opinion of this court with costs to be taxed against the appellees.

A. Daniel Fusaro, *Clerk*

By: /s/ Arthur Heller
Arthur Heller
Deputy Clerk

APPENDIX D

Order Denying Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of September, one thousand nine hundred and eighty.

PRESENT HON. HENRY J. FRIENDLY
HON. WALTER R. MANSFIELD
HON. AMALYA L. KEARSE
Circuit Judges

79-7402

Neil Leist, Philip Smith and Incomco,
Plaintiffs-Appellants

-against-

John Richard Simplot, et al.
Defendants

Clayton Brokerage Co. of St. Louis, Inc., Heinold Commodities, Inc., Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc., New York Mercantile Exchange, Richard B. Levine, Howard Gabler, Alfred Pennisi,
Defendants-Appellees

79-7464

Incomco,
Plaintiff-Appellant

-against-

The New York Mercantile Exchange, Wayne County Produce Co., & Harold Collins,
Defendants

The New York Mercantile Exchange,
Defendant-Appellee

79-7482

National Super Spuds, Inc., William R. Buster, Jr., Willard C. Shiner, Eugene P. Weisman, Richard Welts, Raymond Rothberg, Arthur S. Armstrong, Theodore Brinek, Capgain Holdings, Inc., and Heiz Romminger, individually and on behalf of all persons similarly situated,
Plaintiffs-Appellants

-against

New York Mercantile Exchange, et al.
Defendants

Heinold Commodities, Inc., and Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc.,
Defendants-Appellees

A petition for a rehearing having been filed herein by counsel for the defendant-appellee Clayton Brokerage Co. of St. Louis, Inc.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro
Clerk

APPENDIX E

Order Denying Rehearing *En Banc*

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of September, one thousand nine hundred and eighty.

79-7402

Neil Leist, Philip Smith and Incomco,
Plaintiffs-Appellants

-against-

John Richard Simplot, et al.
Defendants

Clayton Brokerage Co. of St. Louis, Inc., Heinold Commodities, Inc., Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc., New York Mercantile Exchange, Richard B. Levine, Howard Gabler, Alfred Pennisi,
Defendants-Appellees

79-7464

Incomco,
Plaintiff-Appellant

-against-

The New York Mercantile Exchange, Wayne County Produce Co., & Harold Collins,
Defendants

The New York Mercantile Exchange,
Defendant-Appellee

79-7482

National Super Spuds, Inc., William R. Buster, Jr., Willard C. Shiner, Eugene P. Weisman, Richard Welts, Raymond Rothberg, Arthur S. Armstrong, Theodore Brinek, Capgain Holdings, Inc., and Heiz Romminger, individually and on behalf of all persons similarly situated,
Plaintiffs-Appellants

-against

New York Mercantile Exchange, et al.
Defendants

Heinold Commodities, Inc., and Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc.,
Defendants-Appellees

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the defendant-appellee Clayton Brokerage Co. of St. Louis, Inc.,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

Wilfred Feniling
Chief Judge

APPENDIX F

Constitutional, Statutory and Regulatory Provisions Involved

Article I, Section I, United States Constitution

ARTICLE I.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

The Commodity Exchange Act, 7 U.S.C. §§1-24, as amended

§ 1. Short title.

This chapter may be cited as the "Commodity Exchange Act."

§ 2. Definitions

For the purposes of this chapter "contract of sale" shall be held to include sales, agreements of sale, and agreements to sell. The word "person" shall be construed to import the plural or singular, and shall include individuals, associations, partnerships, corporations, and trusts. The word "commodity" shall mean wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs. Solanum tuberosum (Irish potatoes), wood, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions as provided in section 13-1 of this title, and all services rights, and interests in which contracts for future delivery are presently or in the future dealt in: *Provided,* That the Commis-

sion shall have exclusive jurisdiction with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 7 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title: *And provided further,* That, except as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State. Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade. The term "future delivery", as used in this chapter, shall not include any sale of any cash commodity for deferred shipment or delivery. The words "board of trade" shall be held to include and mean any exchange or association, whether incorporated or unincorporated, of persons who shall be engaged in the business of buying or selling commodity or receiving the same for sale on consignment. The words "interstate commerce" shall be construed to mean commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside

thereof, or within any Territory or possession, or the District of Columbia. The words "cooperative association of producers" shall mean any cooperative association, corporate or otherwise, not less than 75 per centum in good faith owned or controlled, directly or indirectly, by producers of agricultural products and otherwise complying with sections 291 and 292 of this title, including any organization acting for a group of such associations and owned or controlled by such associations, provided that business done for or with the United States of America, or any agency thereof, shall not be considered either member or nonmember business in determining the compliance of any such association with said sections. The words "member of a contract market" shall mean and include individuals, associations, partnerships, corporations, and trusts owning or holding membership in, or admitted to membership representation on, a contract market or given members' trading privileges thereon. The words "futures commission merchant" shall mean and include individuals, associations, partnerships, corporations, and trusts engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market and that, in or in connection with such solicitation or acceptance of orders accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom. The words "floor broker" shall mean any person who, in or surrounding any "pit", "ring", "post", or other place provided by a contract market for the meeting of persons similarly engaged, shall purchase or sell for any other person any commodity for future delivery on or subject to the rules of any contract market. The words "the Commission" shall mean the Commodity Futures Trading Commission established under section 4a of this title. The term "commodity trading advisor" shall mean any person who, for compensation or profit, engages in the business of advising others, either directly or through publications or writings, as to the value of commodities or as to the advisability of

trading in any commodity for future delivery on or subject to the rules of any contract market, or who for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning commodities; but does not include (i) any bank or trust company, (ii) any newspaper reporter, newspaper columnist, newspaper editor, lawyer, accountant, or teacher, (iii) any floor broker or futures commission merchant, (iv) the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation including their employees, (v) any contract market, and (vi) such other persons not within the intent of this definition as the Commission may specify by rule, regulation, or order: *Provided,* That the furnishing of such services by the foregoing persons is solely incidental to the conduct of their business or profession. The term "commodity pool operator" shall mean any person engaged in a business which is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market, but does not include such persons not within the intent of this definition as the Commission may specify by rule or regulation or by order.

§ 3. Transaction in interstate commerce

For the purposes of this chapter (but not in any wise limiting the definition of interestate commerce in section 2 of this title) a transaction in respect to any article shall be considered to be in interstate commerce if such article is part of that current of commerce usual in the commodity trade whereby commodity and commodity products and by-products thereof are sent from one State, with the expectation that they will end their transit, after purchase, in another, including in addition to cases within the above general description, all cases where purchase or sale is

either for shipment to another State, or for manufacture within the State and the shipment outside the State of the products resulting from such manufacture. Articles normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this chapter. For the purpose of this section the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nation.

§ 4. Liability of principal for act of agent

For the purpose of this chapter the act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, asociation, partnership, corporation, or trust, as well as of such official, agent, or other person.

§ 4a. Commodity Futures Trading Commission

(a)(1) Establishment; composition; term of Commissioners

There is hereby established, as an independent agency of the United States Government, a Commodity Futures Trading Commission. The Commission shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. In nominating persons for appointment, the President shall seek to establish and maintain a balanced Commission, including, but not limited to, persons of demonstrated knowledge in futures trading or its regulation and persons of demonstrated knowledge in the production, merchandising, processing or distribution of one or more of the commodities or other goods and articles, services, rights and interests covered by this chapter. Not more than three of the members of the Commission shall be members of the same political party. Each Commissioner shall hold office for a

term of five years and until his successor is appointed and has qualified, except that he shall not so continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office, and except (i) any Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and (ii) the terms of office of the Commissioners first taking office after the enactment of this paragraph shall expire as designated by the President at the time of nomination, one at the end of one year, one at the end of two years, one at the end of three years, one at the end of four years, and one at the end of five years.

(2) The President shall appoint, by and with the advice and consent of the Senate, a member of the Commission as Chairman, who shall serve as Chairman at the pleasure of the President. An individual may be appointed as Chairman at the same time that person is appointed as a Commissioner. The Chairman shall be the chief administrative officer of the Commission and shall preside at hearings before the Commission. At any time, the President may appoint, by and with the advice and consent of the Senate, a different Chairman, and the Commissioner previously appointed as Chairman may complete that Commissioner's term as a Commissioner.

(b) Vacancies

A vacancy in the Commission shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission.

(c) General Counsel

The Commission shall have a General Counsel, who shall be appointed by the Commission and serve at the pleasure of the Commission. The General Counsel shall report directly to the Commission and serve as its legal advisor. The Commission shall appoint such other attorneys as may be necessary, in the

opinion of the Commission, to assist the General Counsel, represent the Commission in all disciplinary proceedings pending before it, represent the Commission in courts of law whenever appropriate, assist the Department of Justice in handling litigation concerning the Commission in courts of law, and perform such other legal duties and functions as the Commission may direct.

(d) Executive Director

The Commission shall have an Executive Director, who shall be appointed by the Commission and serve at the pleasure of the Commission. The Executive Director shall report directly to the Commission and perform such functions and duties as the Commission may prescribe.

(e) Powers and functions of Chairman

(1) Except as otherwise provided in this paragraph and in paragraphs (c) and (d) of this section, the executive and administrative functions of the Commission, including functions of the Commission with respect to the appointment and supervision of personnel employed under the Commission, the distribution of business among such personnel and among administrative units of the Commission, and the use and expenditure of funds, according to budget categories, plans, programs, and priorities established and approved by the Commission, shall be exercised solely by the Chairman.

(2) In carrying out any of his functions under the provisions of this paragraph, the Chairman shall be governed by general policies, plans, priorities, and budgets approved by the Commission and by such regulatory decisions, findings, and determination as the Commission may by law be authorized to make.

(3) The appointment by the Chairman of the heads of major administrative units under the Commission shall be subject to the approval of the Commission.

(4) Personnel employed regularly and full time in the immediate offices of Commissioners other than the Chairman shall not be affected by the provisions of this paragraph.

(5) There are hereby reserved to the Commission its functions with respect to revising budget estimates and with respect to determining the distribution of appropriated funds according to major programs and purposes.

(6) The Chairman may from time to time make such provisions as he shall deem appropriate authorizing the performance by any officer, employee, or administrative unit under his jurisdiction of any functions of the Chairman under this paragraph.

(f) Conflict of interest

(1) No Commissioner or employee of the Commission shall accept employment or compensation from any person, exchange, or clearinghouse subject to regulation by the Commission under this chapter during his term of office, nor shall he participate, directly or indirectly, in any contract market operations or transactions of a character subject to regulation by the Commission.

(2) No Commissioner or employee of the Commission classified as a GS-16 or higher in a position excepted from the competitive service by reason of being of a confidential or policymaking character shall, for a period of one year beginning on the last day of service as such Commissioner or employee—

(i) make any appearance before the Commission, or

(ii)make any written or oral communication to the Commission, or any Commissioner or employee of the Commission, on behalf of any person (other than the United States) on any particular matter that is before the Commission,

if such last day of service is more than four months after September 30, 1978. The restrictions in this subparagraph shall not apply to an appearance or response under a subpena issued by the Commission, or any matter of an exclusively personal and individual nature.

(g) Liaison with Department of Agriculture; communications with department of Treasury, Federal Reserve Board, and Securities and Exchange Commission; application by a board of trade for designation as a contract market for future delivery of securities

(1) The Commission shall, in cooperation with the Secretary of Agriculture, maintain a liaison between the Commission and the Department of Agriculture. The Secretary shall take such steps as may be necessary to enable the Commission to obtain information and utilize such services and facilities of the Department of Agriculture as may be necessary in order to maintain effectively such liaison. In addition, the Secretary shall appoint a liaison officer, who shall be an employee of the Office of the Secretary, for the purpose of maintaining a liaison between the Department of Agriculture and the Commission. The Commission shall furnish such liaison officer appropriate office space within the offices of the Commission and shall allow such liaison officer to attend and observe all deliberations and proceedings of the Commission.

(2)(i) The Commission shall maintain communications with the Department of the Treasury, the Board of Governors of the Federal Reserve System, and the Securities and Exchange Commission for the purpose of keeping such agencies fully informed of Commission activities that relate to the responsibilities of those agencies, for the purpose of seeking the views of those agencies on such activities, and for considering the relationships between the volume and nature of investment and trading in contracts of sale of a commodity for future delivery and in securities and financial instruments under the jurisdiction of such agencies.

(ii) When a board of trade applies for designation as a contract market involving transactions for future delivery of any security issued or guaranteed by the United States or any agency thereof, the Commission shall promptly deliver a copy of such application to the Department of the Treasury and the Board of Governors of the Federal Reserve System. The Commission may not designate a board of trade as a contract market based on such application until forty-five days after the date the Commission delivers the application to such agencies or until the Commission receives comments from each of such agencies on the application, whichever period is shorter. Any comments received by the Commission from such agencies shall be included as part of the public record of the Commission's designation proceeding. In designating, or refusing, suspending, or revoking the designation of, a board of trade as a contract market involving transactions for future delivery referred to in this clause or in considering possible emergency action under section 12a(9) of this title with respect to such transactions, the Commission shall take into consideration all comments it receives from the Department of the Treasury and the Board of Governors of the Federal Reserve System and shall consider the effect that any such designation, suspension, revocation, or emergency action may have on the debt financing requirements of the United States Government and the continued efficiency and integrity of the underlying market for government securities.

(iii) The provisions of this subparagraph shall not create any rights, liabilities, or obligations upon which actions may be brought against the Commission.

(h) Transmittal of budget requests and legislative recommendations to Congressional Committees

(1) Whenever the Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit copies of that estimate or request to the House and Senate Appropriations Committees

and the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry.

(2) Whenever the Commission transmits any legislative recommendations, or testimony, or comments on legislation to the President or the Office of Management and Budget, it shall concurrenty transmit copies thereof to the House Committee on Agriculture and the Senate committee on Agriculture, Nutrition, and Forestry. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, or testimony, or comments on legislation to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress. In instances in which the Commission voluntarily seeks to obtain the comments or review of any officer or agency of the United States, the Commission shall include a description of such actions in its legislative recommendations, testimony, or comments on legislation which it transmits to the Congress.

(i) Seal

The Commission shall have an official seal, which shall be judicially noticed.

(j) Rules and regulations

The Commission is authorized to promulgate such rules and regulations as it deems necessary to govern the operating procedures and conduct of the business of the Commission.

§ 5. Resolution declaring dangerous tendency of dealings in commodity futures

Transactions in commodity involving the sale thereof for future delivery as commonly conducted on boards of trade and known as "futures" are affected with a national public interest; such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and

selling commodity and the products and byproducts thereof in interstate commerce; the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of commodity and the products and byproducts thereof and to facilitate the movements thereof in interstate commerce; such transactions are utilized by shippers, dealers, millers, and others engaged in handling commodity and the products and byproducts thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; the transactions and prices of commodity on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling commodity and products and byproducts thereof in interstate commerce, and such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodity and the products and byproducts thereof and render regulation imperative for the protection of such commerce and the national public interest therein.

§ 6. Prohibition against dealings in commodity futures; exceptions

It shall be unlawful for any person to deliver for transmission through the mails or in interstate commerce by telegraph, telephone, wireles, or other means of communication any offer to make or execute, or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale of commodity for future delivery on or subject to the rules of any board of trade in the United States, or for any person to make or execute such contract of sale, which is or may be used for (a) hedging any transaction in interstate commerce in commodity or the products or by-products thereof, or (b) determining the price basis of any such transaction in interstate commerce, or (c)

delivering commodity sold, shipped, or received in interstate commerce for the fulfillment thereof, except, in any of the foregoing cases, where such contract is made by or through a member of a board of trade which has been designated by the Commission as a "contract market," as hereinafter provided in this chapter, and if such contract is evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery: *Provided,* That each board member shall keep such record for a period of three years from the date thereof, or for a longer period if the Commission shall so direct, which record shall at all times be open to the inspection of any representative of the Commission or the United States Department of Justice.

§ 6a. Excessive speculation as burden on interstate commerce; trading or position limits; control; hedging transactions; application of section

(1) Excessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity. For the purpose of diminishing, eliminating, or preventing such burden, the commission shall, from time to time, after due notice and opportunity for hearing, by order, proclaim and fix such limits on the amounts of trading which may be done or positions which may be held by any person under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market as the commission finds are necessary to diminish, eliminate, or prevent such burden. In determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person; and further, such limits upon positions

and trading shall apply to positions held by, and trading done by, two or more persons acting pursuant to an expressed or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single person. Nothing in this section shall be construed to prohibit the commission from fixing different trading or position limits for different commodities, markets, futures, or delivery months, or different trading limits for buying and selling operations, or different limits for the purposes of subparagraphs (A) and (B) of paragraph (2) of this section, or from exempting transactions normally known to the trade as "spreads" or "straddles" or "arbitrage" or from fixing limits applying to such transactions or positions different from limits fixed for other transactions or positions. The word "arbitrage" in domestic markets shall be defined to mean the same as "spread" or "straddle". The Commission is authorized to define the term "international arbitrage".

(2) The commission shall, in such order, fix a reasonable time (not to exceed ten days) after the order's promulgation; after which, and until such order is suspended, modified, or revoked, it shall be unlawful for any person—

(A) directly or indirectly to buy or sell, or agree to buy or sell, under contracts of sale of such commodity for future delivery on or subject to the rules of the contract market or markets to which the order applies, any amount of such commodity during any one business day in excess of any trading limit fixed for one business day by the commission in such order for or with respect to such commodity; or

(B) directly or indirectly to hold or control a net long or a net short position in any commodity for future delivery on or subject to the rules of any contract market in excess of any position limit fixed by the commission for or with respect to such commodity: *Provided,* That such position

limit shall not apply to a position acquired in good faith prior to the effective date of such order.

(3) No order issued under paragraph (1) of this section shall apply to transactions or positions which are shown to be bona fide hedging transactions or positions as such terms shall be defined by the Commission within one hundred and eighty days after the effective date of the Commodity Futures Trading Commission Act of 1974 by order consistent with the purposes of this chapter.

(4) This section shall apply to a person that is registered as a futures commission merchant or as floor broker under authority of this chapter only to the extent that transactions made by such person are made on behalf of or for the account or benefit of such person. This section shall not apply to transactions made by, or on behalf of, or at the direction of, the United States, or a duly authorized agency thereof.

§ 6b. Contracts designed to defraud or mislead; bucketing orders; buying and selling orders for cotton

It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) to cheat or defraud or attempt to cheat or defraud such other person;

(B) Willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) Willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or

(D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person.

Nothing in this section or in any other section of this chapter shall be construed to prevent a futures commission merchant or floor broker who shall have in hand, simultaneously, buying and selling orders at the market for different principals for a like quantity of a commodity for future delivery in the same month executing such buying and selling orders at the market price: *Provided,* That any such execution shall take place on the floor of the exchange where such orders are to be executed at public outcry across the ring and shall be duly reported, recorded, and cleared in the same manner as other orders executed on such exchange: *And provided further,* That such transactions shall be made in accordance with such rules and regulations as the Commission may promulgate regarding the manner of the execution of such transactions.

§ 6c. Prohibited transactions

(a) Commodities specifically listed

It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of, any transaction involving any commodity, which is or may be used for (1) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (2) determining the price basis of any such transaction in interstate commerce in such commodity, or (3) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) if such transaction is, is of the character of, or is commonly known to the trade as, a "wash sale," "cross trade," or "accommodation trade," or is a fictitious sale;

(B) if such transaction involves any commodity specifically set forth in section 2 of this title, prior to October 23, 1974, and if such transaction is of the character of, or is commonly known to the trade as, "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", or

(C) if such transaction is used to cause any price to be reported, registered, or recorded which is not a true and bona fide price.

Nothing in this section shall be construed to prevent the exchange of futures in connection with cash commodity transactions or of futures for cash commodities, or of transfer trades or office trades if made in accordance with board of trade rules applying to such transactions and such rules shall have been approved by the Commission.

(b) Commodities regulated but not specifically listed

No person shall offer to enter into, enter into, or confirm the execution of, any transaction subject to the provisions of paragraph (a) of this section involving any commodity regulated

under this chapter, but not specifically set forth in section 2 of this title, prior to October 23, 1974, which is of the character of, or is commonly known to the trade as an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe within one year after the effective date of the Commodity Futures Trading Commission Act of 1974 unless the Commission determines and notifies the Senate Committee on Agriculture, Nutrition, and Forestry and the House Committee on Agriculture that it is unable to prescribe such terms and conditions within such period of time: *Provided,* That any such order, rule, or regulation may be made only after notice and opportunity for hearing: *And provided further,* That the Commission may set different terms and conditions for different markets.

(c) Commodity option transaction; conditions ending prohibition; excepted persons

Notwithstanding the provisions of subsection (b) of this section, no person may, after September 30, 1978, offer to enter into to enter into, or confirm the execution of any commodity option transaction involving any commodity regulated under this chapter but not specifically set forth in section 2 of this title prior to October 23, 1974, until (1) the Commission transmits to the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry documentation of its ability to regulate successfully such transactions, including a copy of the Commission's proposed rules and regulations, and (2) the expiration of thirty calendar days of continuous session of Congress after the date of such transmittal. The Commission is not precluded from transmitting, at any time, documentation relating to its ability to regulate such transactions regarding individual commodities, classes of commodities, or regulation of such transactions on specific boards of trade. Nothing in this

subsection shall affect any rights or obligations arising out of any transactions subject to the provisions of this subsection entered into, or the execution of which was confirmed, prior to October 1, 1978: *Provided,* That this prohibition shall not apply to any transaction expressly permitted under rules or regulations prescribed by the Commission, before or after September 30, 1978, to be offered to be entered into, entered into, or confirmed, in which the purchaser is a producer, processor, commercial user of, or a merchant handling, the commodity involved in the transaction, or the products or byproducts thereof.

(d) Dealer options exempt from subsections (b) and (c) prohibitions; requirements

Notwithstanding the provisions of subsection (c) of this section—

(1) any person domiciled in the United States who on May 1, 1978, was in the business of granting an option on a physical commodity and was in the business of buying, selling, producing, or otherwise using that commodity, may continue to grant or issue options on that commodity in accordance with Commission regulations in effect on August 17, 1978, until thirty days after the effective date of regulations in effect on August 17, 1978, until thirty days after the effective date of regulations issued by the Commission under clause (2) of this subsection: *Provided,* That if such person files an application for registration under the regulations issued under clause (2) of this subsection within thirty days after the effective date of such regulations, that person may continue to grant or issue options pending a final determination by the Commission on the application; and

(2) the Commission shall issue regulations that permit grantors and futures commission merchants to offer to enter into, enter into, or confirm the execution of, any commodity option transaction on a physical commodity subject to the provisions of subsection (b) of this section if—

(A) the grantor is a person domiciled in the United States who—

(i) is in the business of buying, selling, producing, or otherwise using the underlying commodity;

(ii) at all times has a net worth of at least $5,000,000 certified annually by an independent public accountant using generally accepted accounting principles;

(iii) notifies the Commission and every futures commission merchant offering the grantor's option if the grantor knows or has reason to believe that the grantor's net worth has fallen below $5,000,000;

(iv) segregates daily, exclusively for the benefit of purchasers, money, exempted securities (within the meaning of section 78c(a)(12) of title 15), commercial paper, bankers' acceptances, commercial bills, or unencumbered warehouse receipts, equal to an amount by which the value of each transaction exceeds the amount received or to be received by the grantor for such transaction;

(v) provides an identification number for each transaction; and

(vi) provides confirmation of all orders for such transactions executed, including the execution price and a transaction identification number;

(B) the futures commission merchant is a person who—

(i) has evidence that the grantor meets the requirements specified in subclause (A) of this clause;

(ii) treats and deals with all money, securities, or property received from its customers as payment of the purchase price in connection with such transac-

tions, as belonging to such customers until the expiration of the term of the option, or, if the customer exercises the option, until all rights of the customer under the commodity option transaction have been fulfilled;

(iii) records each transaction in its customer's name by the transaction identification number provided by the grantor;

(iv) provides a disclosure statement to its customers, under regulations of the Commission, that discloses, among other things, all costs, including any markups or commissions involved in such transaction; and

(C) the grantor and futures commission merchant comply with any additional uniform and reasonable terms and conditions the Commission may prescribe, including registration with the Commission.

The Commission may permit persons not domiciled in the United States to grant opions under this subsection under such additional rules, regulations, and orders as the Commission may adopt to provide protection to purchasers that are substantially the equivalent of those applicable to grantors domiciled in the United States. The Commission may terminate the right of any person to grant, offer, or sell options under this subsection only after a hearing, including a finding that the continuation of such right is contrary to the public interest: *Provided,* That pending the completion of such termination proceedings, the Commission may suspend the right to grant, offer, or sell options of any person whose activities in the Commission's judgment present a substantial risk to the public interest.

(e) Rules and regulations

The Commission may adopt rules and regulations, after public notice and opportunity for a hearing on the record, pro-

hibiting the granting, issuance, or sale of options permitted under subsection (d) of this section if the Commission determines that such options are contrary to the public interest.

§ 6d. Futures commission merchants, dealing by unregistered merchants prohibited; moneys and securities of customers, care and use

It shall be unlawful for any person to engage as futures commission merchant in soliciting orders or accepting orders for the purchase or sale of any commodity for future delivery, or involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market unless—

(1) such person shall have registered, under this chapter, with the Commission as such futures commission merchant and such registration shall not have expired nor been suspended nor revoked; and

(2) such person shall, whether a member or nonmember of a contract market, treat and deal with all money, securities, and property received by such person to margin, guarantee, or secure the trades or contracts of any customer of such person, or accruing to such customer as the result of such trades or contracts, as belonging to such customer. Such money, securities, and property shall be separately accounted for and shall not be commingled with the funds of such commission merchant or be used to margin or guarantee the trades or contracts, or to secure or extend the credit, of any customer or person other than the one for whom the same are held: *Provided, however,* That such money, securities, and property of the customers of such futures commission merchant may, for convenience, be commingled and deposited in the same account or accounts with any bank or trust company or with the clearing house organization of such contract market, and that such share thereof as in the normal course of

business shall be necessary to margin, guarantee, secure, transfer, adjust, or settle the contracts or trades of such customers, or resulting market positions, with the clearing-house organization of such contract market or with any member of such contract market, may be withdrawn and applied to such purposes, including the payment of commissions, brokerage, interest, taxes, storage, and other charges, lawfully accruing in connection with such contracts and trades: *Provided further,* That in accordance with such terms and conditions as the Commission may prescribe by rule, regulation, or order, such money, securities, and property of the customers of such futures commission merchant may be commingled and deposited as provided in this section with any other money, securites, and property received by such futures commission merchant and required by the Commission to be separately accounted for and treated and dealt with as belonging to the customers of such futures commission merchant: *Provided further,* That such money may be invested in obligations of the United States, in general obligations of any State or of any political subdivision thereof, and in obligations fully guaranteed as to principal and interest by the United States, such investments to be made in accordance with such rules and regulations and subject to such conditions as the Commission may prescribe.

It shall be unlawful for any person, including but not limited to any clearing agency of a contract market and any depository, that has received any money, securities, or property for deposit in a separate account as provided in paragraph (2) of this section, to hold, dispose of, or use any such money, securities, or property as belonging to the depositing futures commission merchant or any person other than the customers of such futures commission merchant.

§ 6e. Floor brokers; dealings by unregistered broker prohibited

It shall be unlawful for any person to act as floor broker in executing any orders for the purchase or sale of any commodity for future delivery, or involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market unless such person shall have registered, under this chapter, with the Commission as such floor broker and such registration shall not have expired nor been suspended nor revoked.

§ 6f. Registration of commission merchants and brokers; financial requirements of futures commission merchants

(1) Any person desiring to register as futures commission merchant or as floor broker under this section shall be registered upon application to the Commission, which application shall be made in form and manner to be prescribed by the Commission, giving such information and facts as the Commission may deem necessary concerning the business in which the applicant is or will be engaged, including, in the case of applications of futures commission merchants, the names and addresses of the managers of all branch offices and of all correspondents and agents engaged in soliciting or accepting on behalf of such applicant any orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any board of trade, and including also the names of its officers and partners, if partnership, and of its officers, directors, and stockholders, as the Commission may direct, if a corporation. Such person, when registered under this section, shall likewise continue to report and furnish to the Commission the above-mentioned information and such other information pertaining to his business as the Commission may require. Each registration shall expire on December 31 of the year for which issued or at such other time, not less than one year from the date of issuance, as the Commission may by rule, regulation, or order prescribe, and shall be renewed upon application therefor unless the registration has been suspended (and the period of such suspension has not expired) or revoked after notice and hearing as prescribed in this chapter.

(2) Notwithstanding any other provisions of this chapter, no person desiring to register as futures commission merchant shall be so registered unless he meets such minimum financial requirements as the Commission may by regulation prescribe as necessary to insure his meeting his obligation as a registrant, and each person so registered shall at all times continue to meet such prescribed minimum financial requirements: *Provided,* That such minumum financial requirements will be considered met if the applicant for registration or registrant is a member of a contract market and conforms to minimum financial standards and related reporting requirements set by such contract market in its bylaws, rules, regulations, or resolutions and approved by the Commission as adequate to effectuate the purposes of this paragraph (2).

§ 6g. Reporting and recordkeeping

(1) Every person registered hereunder as futures commission merchant or floor broker shall make such reports as are required by the Commission regarding the transactions and positions of such person, and the transactions and positions of the customer thereof, in commodities for future delivery on any board of trade in the United States or elsewhere; shall keep books and records pertaining to such transactions and positions in such form and manner and for such period as may be required by the Commission: and shall keep such books and records open to inspection by any representative of the Commission or the United States Department of Justice.

(2) Every clearinghouse and contract market shall maintain daily trading records. The daily trading records shall include such information as the Commission shall prescribe by rule.

(3) Floor brokers and futures commission merchants shall maintain daily trading records for each customer in such manner and form as to be identifiable with the trades referred to in paragraph (2) of this section.

(4) Daily trading records shall be maintained in a form suitable to the Commission for such period as may be required by the Commission. Reports shall be made from the records maintained at such times and at such places and in such form as the Commission may prescribe by rule, order, or regulation in order to protect the public interest and the interest of persons trading in commodity futures.

(5) Before the beginning of trading each day, the exchange shall, insofar as is practicable and under terms and conditions specified by the Commission, make public the volume of trading on each type of contract for the previous day and such other information as the Commission deems necessary in the public interest and prescribes by rule, order, or regulation.

(6) Nothing contained in this section shall be construed to prohibit the Commission from making separate determinations for different clearinghouses, contract markets, and exchanges when such determinations are warranted in the judgment of the Commission.

§ 6h. Dealing other than through member of contract market

It shall be unlawful for any person—

(1) to conduct any office or place of business anywhere in the United States or its territories for the purpose of soliciting or accepting any orders for the purchase or sale of any commodity for future delivery, or for making or offering to make any contracts for the purchase or sale of any commodity for future delivery, or for conducting any dealings in commodities for future delivery, that are or may be used for

(A) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or

(B) determining the price basis of any such transaction in interstate commerce, or

(C) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof,

if such orders, contracts, or dealings are executed or consummated otherwise than by or through a member of a contract market; or

(2) falsely to represent such person to be a member of a contract market, or the representative or agent of such member, or to be a futures commission merchant registered under this chapter, or the agent of such registered futures commission merchant, in soliciting or handling any order or contract for the purchase or sale of any commodity in interstate commerce or for future delivery, or falsely to represent in connection with the handling of any such order or contract that the same is to be or has been executed on, or by or through any member of, any contract market.

§ 6i. Reports of deals equal to or in excess of trading limits; books and records; cash and controlled transactions

It shall be unlawful for any person to make any contract for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market unless such person shall report or cause to be reported to the properly designated officer in accordance with the rules and regulations of the Commission (1) Whenever such person shall directly or indirectly make such contracts with respect to any commodity, or any future of such commodity, during any one day in an amount equal to or in excess of such amount as shall be fixed from time to time by the Commission; and (2) Whenever such person shall directly or indirectly have or obtain a long or short position in any commodity or in any future of such commodity, equal to or in excess of such amount as shall be fixed from time to time by the Commission. Such person shall keep books and records of all futures transactions and positions coming within the provisions of (1) and (2) hereof, and shall keep books and records of such cash or spot transactions in such commodity entered into, and inventories and purchase and sale commitments of such commodity held, in any month in which such person is required

to make any report under the provisions of (1) or (2), as the Commission may require. Such books and records shall show complete details concerning all such transactions, positions, inventories, and commitments, including the names and addresses, of all persons having any interest therein, and shall be open at all times to inspection by any representative of the Commission or the United States Department of Justice. For the purposes of this section, the futures and cash or spot transactions and positions of any person shall include such transactions and positions of any persons directly or indirectly controlled by such person.

§ 6j. Trades and executions by floor brokers; trades by futures commission merchants

(1) The Commission shall within nine months after the effective date of the Commodity Futures Trading Commission Act of 1974, and subsequently when it determines that changes are required, make a determination, after notice and opportunity for hearing, whether or not a floor broker may trade for his own account or any account in which such broker has trading discretion, and also execute a customer's order for future delivery and, if the Commission determines that such trades and such executions shall be permitted, the Commission shall further determine the terms, conditions, and circumstances under which such trades and such executions shall be conducted: *Provided,* That any such determination shall, at a minimum take into account the effect upon the liquidity of trading of each market: *And provided further,* That nothing herein shall be construed to prohibit the Commission from making separate determinations for different contract markets when such are warranted in the judgment of the Commission, or to prohibit contract markets from setting terms and conditions more restrictive than those set by the Commission.

(2) The Commission shall within nine months after the effective date of the Commodity Futures Trading Commission Act

of 1974, and subsequently when it determines that changes are required, make a determination, after notice and opportunity for hearing, whether or not a futures commission merchant may trade for its own account or any proprietary account, as defined by the Commission, and if the Commission determines that such trades shall be permitted, the Commission shall further determine the terms, conditions, and circumstances under which such trades shall be conducted: *Provided,* That any such determination, at a minimum, shall take into account the effect upon the liquidity of trading of each market: *And provided further,* That nothing herein shall be construed to prohibit the Commission from making separate determinations for different contract markets when such are warranted in the judgment of the Commission, or to prohibit contract markets from setting terms and conditions more restrictive than those set by the Commission.

§ 6k. Registration of associates of futures commission merchants

(1) It shall be unlawful for any person to be associated with any futures commission merchant or with any agent of a futures commission merchant as a partner, officer, or employee (or any person occupying a similar status or performing similar functions), in any capacity which involves (i) the solicitation or acceptance of customers' orders (other than in a clerical capacity) or (ii) the supervision of any person or persons so engaged, unless such person shall have registered, under this chapter, with the Commission and such registration shall not have expired nor been suspended (and the period of suspension has not expired) or revoked, and it shall be unlawful for any futures commission merchant or any agent of a futures commission merchant to permit such a person to become or remain associated with him in any such capacity if such futures commission merchant or agent knew or should have known that such person was not so registered or that such registration had expired, been suspended (and the period of suspension has not ex-

pired) or revoked: *Provided,* That any individual who is registered as a floor broker or futures commission merchant (and such registration is not suspended or revoked) need not also register under these provisions.

(2) Any such person desiring to be registered shall make application to the Commission in the form and manner prescribed by the Commission, giving such information and facts as the Commission may deem necessary concerning the applicant. Such person, when registered hereunder, shall likewise continue to report and furnish to the Commission such information as the Commission may require. Such registration shall expire two years after the effective date thereof or at such other time, not less than one year from the date of issuance thereof, as the Commission may by rule, regulation, or order prescribe and shall be renewed upon application therefor, unless the registration has been suspended (and the period of such suspension has not expired) or revoked after notice and hearing as prescribed in section 9 of this title: *Provided,* That upon initial registration, unless the Commission otherwise prescribes by rule, regulation, or order, the effective period of such registration shall be not more than two years nor less than one year from the effective date thereof.

(3) The Commission may authorize a registered futures association to perform any portion of the registration functions under this section, in accordance with rules approved by the Commission, and subject to the provisions of this chapter applicable to registrations granted by the Commission.

§ 6l. Commodity trading advisors and commodity pool operators; Congressional finding

It is hereby found that the activities of commodity trading advisors and commodity pool operators are affected with a national public interest in that, among other things—

(1) their advice, counsel, publications, writings, analyses, and reports are furnished and distributed, and their contracts, solicitations, subscriptions, agreements, and other arrangements with clients take place and are negotiated and performed by the use of the mails and other means and instrumentalities of interstate commerce;

(2) their advice, counsel, publications, writings, analyses, and reports customarily relate to and their operations are directed toward and cause the purchase and sale of commodities for future delivery on or subject to the rules of contract markets; and

(3) the foregoing transactions occur in such volume as to affect substantially transactions on contract markets.

§ 6m. Use of mails or other means or instrumentalities of interstate commerce by commodity trading advisors and commodity pool operators

It shall be unlawful for any commodity trading advisor or commodity pool operator, unless registered under this chapter, to make use of the mails or any means or instrumentality of interstate commerce in connection with his business as such commodity trading advisor or commodity pool operator: *Provided,* That the provisions of this section shall not apply to any commodity trading advisor who, during the course of the preceding twelve months, has not furnished commodity trading advice to more than fifteen persons and who does not hold himself out generally to the public as a commodity trading advisor. The provisions of this section shall not apply to any commodity trading advisor who is a (1) dealer, processor, broker, or seller in cash market transactions of any commodity specifically set forth in section 2 of this title prior to October 23, 1974, (or products thereof) or (2) monprofit, voluntary membership, general farm organization, who provides advice on the sale or purchase of any commodity specifically set forth in section 2 of this title prior to October 23, 1974; if the advice by the person described

in clause (1) or (2) or this sentence as a commodity trading advisor is solely incidental to the conduct of that person's business: *Provided,* That such person shall be subject to proceedings under section 18 of this title.

§ 6n. Registration of commodity trading advisors and commodity pool operators; application, expiration and renewal; record keeping and reports; disclosure; statements of account; denial of registration; revocation or suspension

(1) Any commodity trading advisor or commodity pool operator, or any person who contemplates becoming a commodity trading advisor or commodity pool operator, may register under this chapter by filing an application with the Commission. Such application shall contain such information, in such form and detail, as the Commission may, by rules and regulations, prescribe as necessary or appropriate in the public interest, including the following:

(A) the name and form of organization, including capital structure, under which the applicant engages or intends to engage in business; the name of the State under the laws of which he is organized; the location of his principal business office and branch offices, if any; the names and addresses of all partners, officers, directors, and persons performing similar functions or, if the applicant be an individual, of such individual; and the number of employees;

(B) the education, the business affiliations for the past ten years, and the present business affiliations of the applicant and of his partners, officers, directors, and persons performing similar functions and of any controlling person thereof;

(C) the nature of the business of the applicant, including the manner of giving advice and rendering of analyses or reports;

(D) the nature and scope of the authority of the applicant with respect to clients' funds and accounts;

(E) the basis upon which the applicant is or will be compensated; and

(F) such other information as the Commission may require to determine whether the applicant is qualified for registration.

(2) Each registration under this section shall expire on the 30th day of June of each year, or at such other time, not less than one year from the effective date thereof, as the Commission may by rule, regulation, or order prescribe, and shall be renewed upon application therefor subject to the same requirements as in the case of an original application.

(3)(A) Every commodity trading advisor and commodity pool operator registered under this chapter shall maintain books and records and file such reports in such form and manner as may be prescribed by the Commission. All such books and records shall be kept for a period of at least three years, or longer if the Commission so directs, and shall be open to inspection by any representative of the Commission or the Department of Justice. Upon the request of the Commission, a registered commodity trading advisor or commodity pool operator shall furnish the name and address of each client, subscriber, or participant, and submit samples or copies of all reports, letters, circulars, memorandums, publications, writings, or other literature or advice distributed to clients, subscribers, or participants, or prospective clients, subscribers, or participants.

(B) Unless otherwise authorized by the Commission by rule or regulation, all commodity trading advisors and commodity pool operators shall make a full and complete disclosure to their subscribers, clients, or participants of all futures market positions taken or held by the individual principals of their organization.

(4) Every commodity pool operator shall regularly furnish statements of account to each participant in his operations. Such statements shall be in such form and manner as may be prescribed by the Commission and shall include complete information as to the current status of all trading accounts in which such participant has an interest.

(5) The Commission is authorized, without hearing, to deny registration to any person as a commodity trading advisor or commodity pool operator if such person is subject to an outstanding order under this chapter denying to such person trading privileges on any contract market, or suspending or revoking the registration of such person as a commodity trading advisor, commodity pool operator, futures commission merchant, or floor broker, or suspending or expelling such person from membership on any contract market.

(6) The Commission after hearing may by order deny registration, revoke or suspend the registration of any commodity trading advisor or commodity pool operator if the Commission finds that such denial, revocation, or suspension is in the public interest and that—

> (A) the operations of such person disrupt or tend to disrupt orderly marketing conditions, or cause or tend to cause sudden or unreasonable fluctuations or unwarranted changes in the prices of commodities;
>
> (B) such commodity trading advisor or commodity pool operator, or any partner, officer, director, person performing similar function or controlling person thereof—
>
> > (i) has within ten years of the issuance of such order been convicted of any felony or misdemeanor involving the purchase or sale of any commodity or security, or arising out of any conduct or practice of such commodity trading advisor or commodity pool operator or affiliated person as a commodity trading advisor or commodity pool operator; or

(ii) at the time of the issuance of such order, is permanently or temporarily enjoined by order, judgment or decree of any court of competent jurisdiction from acting as a commodity trading advisor, commodity pool operator, futures commission merchant, or floor broker, or as an affiliated person or employee of any of the foregoing, or from engaging in or continuing any conduct or practice in connection with any such activity or in connection with the purchase or sale of commodities or securities; or

(C) any partner, officer, or director of such commodity trading advisor or commodity pool operator, or any person performing a similar function or any controlling person thereof is subject to an outstanding order of the Commission denying trading privileges on any contract market to such person, or suspending or revoking the registration of such person as a commodity trading advisor, commodity pool operator, futures commission merchant, or floor broker, or suspending or expelling such person from membership on any contract market.

§ 6o. Fraud and misrepresentation by commodity trading advisors and commodity pool operators

(1) It shall be unlawful for any commodity trading advisor or commodity pool operator, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—

(A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or

(B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant.

(2) It shall be unlawful for any commodity trading advisor or commodity pool operator registered under this chapter to represent or imply in any manner whatsoever that he has been spon-

sored, recommended, or approved, or that his abilities or qualifications have in any respect been passed upon by the United States or any agency or officer thereof: *Provided,* That this section shall not be construed to prohibit a statement that a person is registered under this chapter as a commodity trading advisor or commodity pool operator, if such statement is true in fact and if the effect of such registration is not misrepresented.

§ 6p. Standards and examinations

The Commission may specify by rules and regulations appropriate standards with respect to training, experience, and such other qualifications as the Commission finds necessary or desirable to insure the fitness of futures commission merchants, floor brokers, and those persons associated with futures commission merchants or floor brokers. In connection therewith, the Commission may prescribe by rules and regulations the adoption of written proficiency examinations to be given to applicants for registration as futures commission merchants, floor brokers, and those persons associated with futures commission merchants or floor brokers, and the establishment of reasonable fees to be charged to such applicants to cover the administration of such examinations. The Commission may further prescribe by rules and regulations that, in lieu of examinations administered by the Commission, futures associations registered under section 21 of this title or contract markets may adopt written proficiency examinations to be given to applicants for registration as futures commission merchants, floor brokers, and those persons associated with futures commission merchants or floor brokers, and charge reasonable fees to such applicants to cover the administration of such examinations. Notwithstanding any other provision of this section, the Commission may specify by rules and regulations such terms and conditions as it deems appropriate to protect the public interest wherein exception to any written proficiency examination shall be made with respect to individuals who have demonstrated, through training and experience, the degree of proficiency and

skill necessary to protect the interests of the customers of futures commission merchants and floor brokers.

§ 7. Designation of board of trade as "contract market"; conditions and requirements

The Commission is hereby authorized and directed to designate any board of trade as a "contract market" when, and only when, such board of trade complies with and carries out the following conditions and requirements:

(a) When located at a terminal market where any cash commodity of the kind specified in the contracts of sale of commodity for future delivery to be executed on such board is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the commodity and the differences in value between the various grades of such commodity, and where there is available to such board of trade, official inspection service approved by the Secretary of Agriculture or the Commission for the purpose: *Provided,* That any board of trade not so located shall be designated as a "contract market" if such board of trade provides for the delivery of commodities on such contracts at a delivery point or points and upon terms and conditions approved by the Commission.

(b) When the governing board thereof provides for the making and filing by the board or any member thereof, as the Commission may direct, of reports in accordance with the rules and regulations, and in such manner and form and at such times as may be prescribed by the Commission, showing the details and terms of all transactions entered into by the board, or the members thereof, either in cash transactions or transactions for future delivery consummated on or subject to the rules of a board of trade, and when such governing board provides, in accordance with such rules and regulations, for the keeping of a record by the board or the members of the board of trade as the Commission may direct, showing the details and terms of all cash and future transactions entered into by them, consum-

mated on or subject to the rules of a board of trade, such record to be in permanent form, showing the parties to all such transactions, including the persons for whom made, any assignments or transfers thereof, with the parties thereto, and the manner in which said transactions are fulfilled, discharged, or terminated. Such record shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Commission shall so direct, and shall at all times be open to the inspection of any representative of the Commission or United States Department of Justice.

(c) When the governing board thereof provides for the prevention of dissemination by the board or any member thereof of false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of commodity in interstate commerce.

(d) When the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board.

(e) When the governing board thereof does not exclude from membership in and all privileges on such board of trade any duly authorized representative of any lawfully formed and conducted cooperative association of producers having adequate financial responsibility which is engaged in any cash commodity business, if such association has complied, and agrees to comply, with such terms and conditions as are or may be imposed lawfully on other members of such board: *Provided,* That no rule of a contract market shall forbid or be construed to forbid the return on a patronage basis by such cooperative association to its bona fide members of moneys collected in excess of the expense of conducting the business of such association.

(f) When the governing board provides for making effective the final orders or decisions entered pursuant to the provisions of section 9 of this title, and the orders issued pursuant to the

provisions of section 7a of this title, and for compliance in all other respects with the requirements applicable to such board of trade under this chapter.

(g) When such board of trade demonstrates that transactions for future delivery in the commodity for which designation as a contract market is sought will not be contrary to the public interest.

§ 7a. Duties of contract markets

Each contract market shall—

(1) Bylaws, rules, etc.; furnishing copies to Commission

Promptly furnish the Commission copies of all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or any committee, and of all changes and proposed changes therein;

(2) Access for inspection of books and records

Keep all books, records, minutes, and journals of proceedings of such contract market, and its governing board, committees, subsidiaries, and affiliates in a manner that will clearly describe all matters discussed by such contract market, governing board, committees, subsidiaries and affiliates and reveal any action taken in such matters, and allow inspection at all times by any authorized representative of the Commission or United States Department of Justice of all such books, records, minutes, and journals of proceedings. Such books, records, minutes, and journals of proceedings shall be kept for a period of three years from the date thereof, or for a longer period if the Commission shall so direct;

(3) Books and records of warehouses; keeping and inspection

Require the operators of warehouses in which or out of which any commodity is deliverable on any contract for future delivery made on or subject to the rules of such contract market to make

such reports, keep such records, and permit such warehouse visitation as the Commission may prescribe. Such books and records shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Commission shall so direct, and such books, records, and warehouses shall be open at all times to inspection by any representative of the Commission or United States Department of Justice;

(4) Periods of delivery; provisions for

When so directed by order of the Commission, provide for a period, after trading in contracts of sale of any commodity for future delivery in a delivery month has ceased, during which contracts of sale of such commodity for future delivery in such month may be satisfied by the delivery of the actual cash commodity. Whenever, after due notice and opportunity for hearing, the Commission finds that provision for such a period of delivery for any one or more commodities or markets would prevent or tend to prevent "squeezes" and market congestion endangering price stability, it shall, by order, require such period of delivery (which shall be not less than three nor more than ten business days) applicable to such commodities and markets as it finds will prevent or tend to prevent such "squeezes" and market congestion: *Provided, however,* That such order shall not apply to then existing contracts;

(5) Notice of date of intended delivery

Require the party making delivery of any commodity on any contract of sale of such commodity for future delivery to furnish the party obligated under the contract to accept delivery, written notice of the date of delivery at least one business day prior to such date of delivery. Whenever, after due notice and opportunity for hearing, the Commission finds that the giving of longer notice of delivery is necessary to prevent or diminish unfair practices in trading in any one or more commodities or markets, it shall by order require such longer notice of delivery (which shall be not more than ten business days) applicable to

such commodities and markets as it finds will prevent or diminish such unfair practices: *Provided, however,* That such order shall not apply to then existing contracts;

(6) United States standards; conformity of grades to

Require that all contracts of sale of any commodity for future delivery on such contract market shall provide for the delivery thereunder of commodities of grades conforming to United States standards, if such standards shall have been officially promulgated and adopted by the Commission;

(7) Warehouse receipts as satisfaction of futures contract

Require that receipts issued under the United States Warehouse Act [7 U.S.C. 241 *et seq.*] shall be accepted in satisfaction of any futures contract, made on or subject to the rules of such contract market, without discrimination and notwithstanding that the warehouseman issuing such receipts is not also licensed as a warehouseman under the laws of any state or enjoys other or different privileges than under State law: *Provided, however,* That such receipts shall be for the kind, quality, and quantity of commodity specified in such contract and that the warehouse in which the commodity is stored meets such reasonable requirements as may be imposed by such contract market on other warehouses as to location, accessibility, and suitability for warehousing and delivery purposes: *And provided further,* That this paragraph shall apply only to futures contracts for those commodities which may be delivered from a warehouse subject to the United States Warehouse Act;

(8) Enforcement of bylaws, etc., relating to trading requirements

Enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or

relate to other trading requirements, and which have been approved by the Commission pursuant to paragraph (12) of this section; and revoke and not enforce any such bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, which has been disapproved by the Commission;

(9) Enforcement of bylaws, etc., providing minimum financial standards and related reporting requirements

Enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or by any committee, which provide minimum financial standards and related reporting requirements for futures commission merchants who are members of such contract market, and which have been approved by the Commission;

(10) Delivery points

Permit the delivery of any commodity, on contracts of sale thereof for future delivery, of such grade or grades, at such point or points and at such quality and locational price differentials as will tend to prevent or diminish price manipulation, market congestion, or the abnormal movement of such commodity in interstate commerce. If the Commission after investigation finds that the rules and regulations adopted by a contract market permitting delivery of any commodity on contracts of sale thereof for future delivery, do not accomplish the objectives of this paragraph, then the Commission shall notify the contract market of its findings and afford the contract market an opportunity to make appropriate changes in such rules and regulations. If the contract market within seventy-five days of such notification fails to make the changes which in the opinion of the Commission are necessary to accomplish the objectives of this paragraph, then the Commission after granting the contract market an opportunity to be heard, may change or supplement such rules and regulations of the contract market to achieve the above objectives: *Provided,* That any order issued

under this paragraph shall not apply to contracts of sale for future delivery in any months in which contracts are currently outstanding and open: *And provided further,* That no requirement for an additional delivery point or points shall be promulgated following hearings until the contract market affected has had notice and opportunity to file exceptions to the proposed order determining the location and number of such delivery point or points;

(11) Settlement of customers' claims and grievances

Provide a fair and equitable procedure through arbitration or otherwise (such as by delegation to a registered futures association having rules providing for such procedures) for the settlement of customers' claims and grievances against any member or employee thereof: *Provided,* That (i) the use of such procedure by a customer shall be voluntary, (ii) the procedure shall not be applicable to any claim in excess of $15,000, (iii) the procedure shall not result in any compulsory payment except as agreed upon between the parties, and (iv) the term "customer" as used in this paragraph shall not include a futures commission merchant or a floor broker; and

(12) Commission approval of bylaws, rules, regulations, and resolutions

Except as otherwise provided in this paragraph, submit to the Commission for its approval all bylaws, rules and regulations, and resolutions made or issued by such contract market, or by the governing board thereof or any committee thereof which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements except those relating to the setting of levels of margin. At least thirty days before approving any such bylaws, rules regulations, and resolutions of major economic significance, as determined by the Commission, the Commission shall publish in the Federal Register such bylaws, rules,

regulations, and resolutions. The Commission shall give interested persons an opportunity to participate in the approval process through the submission of written data, views, or arguments. The determination by the Commission whether any such bylaws, rules, regulations, or resolutions are of major economic significance shall be final and not subject to judicial review. The Commission shall approve, within thirty days of their receipt (or within sixty days of their receipt if the Commission determines them to be of major economic significance) unless the Commission notifies the contract market of its inability to make such determination within such period of time, such bylaws, rules, regulations and resolutions upon a determination that such bylaws, rules, regulations, and resolutions are not in violation of the provisions of this chapter or the regulations of the Commission and thereafter the Commission shall disapprove, after appropriate notice and opportunity for hearing, any bylaw, rule, regulation, or resolution which the Commission finds at any time is in violation of the provisions of this chapter or the regulations of the Commission. The Commission shall specify the terms and conditions under which a contract market may, in an emergency, as defined by the Commission, adopt a temporary rule dealing with trading requirements without prior Commission approval. In the event of such an emergency, as defined by the Commission, requiring immediate action, the contract market by a two-thirds vote of its governing board may place into immediate effect without prior Commission approval a temporary rule dealing with such emergency if it notifies the Commission of such action with a complete explanation of the emergency involved. The Commission may adopt a regulation exempting enumerated types of contract market operational and administrative rules from the requirement that they be submitted to the Commission for its approval.

§ 7b. Suspension or revocation of designation as "contract market"

The failure or refusal of any board of trade to comply with any of the provisions of this chapter, or any of the rules, regulations, or orders of the Commission thereunder, shall be cause for suspending for a period not to exceed six months or revoking the designation of such board of trade as a "contract market" in accordance with the procedure and subject to the judicial review provided in section 8 of this title.

§ 8. Application for designation as "contract market"; suspension or revocation of designation; hearing; review by court of appeals

Any board of trade desiring to be designated a "contract market" shall make application to the Commission for such designation and accompany the same with a showing that it complies with the conditions of section 7 of this title, and with a sufficient assurance that it will continue to comply with the requirements of such section 7. In the event of a refusal to designate as a "contract market" any board of trade that has made application therefor, such board of trade shall be afforded an opportunity for a hearing on the record before the Commission, with the right to appeal an adverse decision after such hearing to the court of appeals as provided for in other cases in paragraph (a) of this section.

(a) The Commission is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title or that such board of trade, or any director, officer, agent, or employee thereof, otherwise is violating or has violated any of the provisions of this chapter or any of the rules, regulations, or order of the Commission thereunder. Such suspension or revocation shall only be after a notice to the officers of the board of trade affected and upon a hearing on the record: *Provided,* That such suspension or revocation shall

be final and conclusive, unless within fifteen days after such suspension or revocation by the Commission such board of trade appeals to the court of appeals for the circuit in which it has its principal place of business, by filing with the clerk of such court a written petition praying that the order of the Commission be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such board of trade will pay the costs of the proceedings if the court so directs. The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Commission and file in the court the record in such proceedings, as provided in section 2112 of title 28. The testimony and evidence taken or submitted before the Commission, duly filed as aforesaid as a part of the record, shall be considered by the court of appeals as the evidence in the case. The proceedings in such cases in the court of appeals shall be made a preferred cause and shall be expedited in every way. Such a court may affirm or set aside the order of the Commission or may direct it to modify its order. No such order of the Commission shall be modified or set aside by the court of appeals unless it is shown by the board of trade that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such board of trade for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of the Commission.

§ 9. Exclusion of persons from privilege of "contract markets"; procedure for exclusion: review by court of appeals

If the Commission has reason to believe that any person (other than a contract market) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market, or has willfully made any false or misleading statement of a material fact in any registration application or any report filed

with the Comission under this chapter, or willfully omitted to state in any such application or report any material fact which is required to be stated therein, or otherwise is violating or has violated any of the provisions of this chapter or of the rules, regulations, or orders of the Commission thereunder, it may serve upon such person a complaint stating its charges in that respect, which complaint shall have attached or shall contain therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made prohibiting it from trading on or subject to the rules of any contract market, and directing that all contract markets refuse all trading privileges to such person, until further notice of the Commission, and to show cause why the registration of such person, if registered as futures commission merchant or any person asssociated therewith as described in section 6k of this title, commodity trading advisor, commodity pool operator, or as floor broker hereunder, should not be suspended or revoked. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the Commission, or before an Administrative Law Judge designated by the Commission, which Administrative Law Judge shall cause all evidence to be reduced to writing and forthwith transmit the same to the Commission. Upon evidence received, the Commission may prohibit such person from trading on or subject to the rules of any contract market and require all contract markets to refuse such person all trading privileges thereon for such-period as may be specified in the order, and, if such person is registered as futures commission merchant or any person associated therewith as described in section 6k of this title, commodity trading advisor, commodity pool operator, or as floor broker hereunder, may suspend, for a period not to exceed six months, or revoke, the registration of such person, and may assess such person a civil penalty of not more than $100,000 for each such violation. Notice of such order shall be sent forthwith by registered mail or by certified mail or delivered to the offending person and to the gover-

ning boards of said contract markets. After the issuance of the order by the Commission, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States court of appeals of the circuit in which the petitioner is doing business a written petition, within fifteen days after the notice of such order is given to the offending person praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and thereupon the Commission shall file in the court the record theretofore made, as provided in section 2112 of title 28. Upon the filing of the petition the court shall have jurisdiction to affirm, to set aside, or modify the order of the Commission, and the findings of the Commission as to the facts, if supported by the weight of evidence, shall in like manner be conclusive.

§ 9a. Assessment of money penalties

In determining the amount of the money penalty assessed under section 9 of this title, the Commission shall consider, in the case of a person whose primary business involves the use of the commodity futures market—the appropriateness of such penalty to the size of the business of the person charged, the extent of such person's ability to continue in business, and the gravity of the violation; and in the case of a person whose primary business does not involve the use of the commodity futures market— the appropriateness of such penalty to the net worth of the person charged, and the gravity of the violation. If the offending person upon whom such penalty is imposed, after the lapse of the period allowed for appeal or after the affirmance of such penalty, shall fail to pay such penalty the Commission shall refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

§ 10. Repealed. June 25, 1948, ch. 646, § 39, 62 Stat. 992, eff. Sept. 1, 1948

§ 10a. Cooperative associations and corporations, exclusion from board of trade; rules of board inapplicable to payment of compensation by association

(1) No board of trade which has been designated as a "contract market" shall exclude from membership in, and all privileges on, such board of trade, any association or corporation engaged in cash commodity business having adequate financial responsibility which is organized under the cooperative laws of any State, or which has been recognized as a cooperative association of producers by the United States Government or by any agency thereof, if such association or corporation complies and agrees to comply with such terms and conditions as are or may be imposed lawfully upon other members of such board, and as are or may be imposed lawfully upon a cooperative association of producers engaged in cash commodity business, unless such board of trade is authorized by the commission to exclude such association or corporation from membership and privileges after hearing held upon at least three days' notice subsequent to the filing of complaint by the board of trade: *Provided, however,* That if any such association or corporation shall fail to meet its obligations with any established clearing house or clearing agency of any contract market, such association or corporation shall be ipso facto debarred from further trading as may be necessary to close open trades and to discharge existing contracts in accordance with the rules of such contract market applicable in such cases. Such commission may prescribe that such association or corporation shall have and retain membership and privileges, with or without imposing conditions, or it may permit such board of trade immediately to bar such association or corporation from membership and privileges. Any order of said commission entered hereunder shall be reviewable by the court of appeals for the circuit in which such association or corporation, or such board of trade, has its principal place of business, on written petition either of such association or corporation, or of such board of trade,

under the procedure provided in section 8 of this title, but such order shall not be stayed by the court pending review.

(2) No rule of any board of trade designated as a contract market shall forbid or be construed to forbid the payment of compensation on a commodity-unit basis, or otherwise, by any federated cooperative association to its regional member-associations for services rendered or to be rendered in connection with any organization work, educational activity, or procurement of patronage, provided no part of any such compensation is returned to patrons (whether members or nonmembers) of such cooperative association, or of its regional or local member-association, otherwise than as a dividend on capital stock or as a patronage dividend out of the net earnings or surplus of such federated cooperative association.

§ 11. Vacation on request of designation as "contract market"; redesignation

Any board of trade that has been designated a contract market in the manner provided in this chapter may have such designation vacated and set aside by giving notice in writing to the Commission requesting that its designation as a contract market be vacated, which notice shall be served at least ninety days prior to the date named therein as the date when the vacation of designation shall take effect. Upon receipt of such notice the Commission shall forthwith order the vacation of the designation of such board of trade as a contract market, effective upon the day named in the notice, and shall forthwith send a copy of the notice and its order to all other contract markets. From and after the date upon which the vacation became effective the said board of trade can thereafter be designated again a contract market by making application to the Commission in the manner in this chapter provided for an original application.

§ 12. Public disclosure

(a) Investigations respecting operations of boards of trade and others subject to this chapter; publication of results; restrictions

For the efficient execution of the provisions of this chapter, and in order to provide information for the use of Congress, the Commission may make such investigations as it deems necessary to ascertain the facts regarding the operations of boards of trade and other persons subject to the provisions of this chapter. The Commission may publish from time to time the results of any such investigation and such general statistical information gathered therefrom as it deems of interest to the public: *Provided,* That except as otherwise specifically authorized in this chapter, the Commission may not publish data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.

(b) Market positions, business transactions, trade secrets, or names of customers made in connection with congressional proceedings or administrative or judicial proceedings under this chapter

The Commission may disclose publicly any data or information that would separately disclose the market positions, business transactions, trade secrets, or names of customers of any person when such disclosure is made in connection with a congressional proceeding, or in an administrative or judicial proceeding brought under this chapter.

(c) Reports respecting conduct of boards of trade or transactions of violators; contents

The Commission may make or issue such reports as it deems necessary, or such opinions or orders as may be required under other provisions of law, relative to the conduct of any board of trade or to the transactions of any person found guilty of violating the provisions of this chapter or the rules, regulations, or orders of the Commission thereunder in proceedings brought under sections 8, 9 and 15 of this title. In any such report or opinion, the Commission may set forth the facts as to any actual

transaction or any information referred to in subsection (b) of this section, if such facts or information have previously been disclosed publicly in connection with a congressional proceeding, or in an administrative or judicial proceeding brought under this chapter.

(d) Investigations respecting marketing conditions of commodities and commodity products and byproducts; reports

The Commission, upon its own initiative or in cooperation with existing governmental agencies, shall investigate the marketing conditions of commodities and commodity products and byproducts, including supply and demand for these commodities, cost to the consumer, and handling and transportation charges. It shall also compile and furnish to producers, consumers, and distributors, by means of regular or special reports, or by such other methods as it deems most effective, information respecting the commodity markets, together with information on supply, demand, prices, and other conditions in this and other countries that affect the markets.

(e) Names and addresses of traders of boards of trade previously disclosed; disclosure to Congress and/or to any department or agency of Executive Branch

The Commission may disclose and make public, where such information has previously been disclosed publicly in accordance with the provisions of this section, the names and addresses of all traders on the boards of trade on the commodity markets with respect to whom the Commission has information, and any other information in the possession of the Commission relating to the amount of commodities purchased or sold by each such trader. Upon the request of any committee of either House of Congress, acting within the scope of its jurisdiction, the Commission shall furnish to such committee the names and addresses of all traders on such boards of trade with respect to whom the Commission has information, and any other infor-

mation in the possession of the Commission relating to the amount of any commodity purchased or sold by each such trader. Upon the request of any department or agency of the Executive Branch of the Government of the United States, acting within the scope of its jurisdiction, the Commission may furnish to such department or agency any information in the possession of the Commission obtained in connection with the administration of this chapter. However, any information furnished under this subsection to any Federal department or agency shall not be disclosed by such department or agency except in any action or proceeding under the laws of the United States to which it, the Commission, or the United States is a party.

(f) Annual report to Congress

The Commission shall submit to Congress a written report within one hundred and twenty days after the end of each fiscal year detailing the operations of the Commission during such fiscal year. The Commission shall include in such report such information, data, and legislative recommendations as it deems advisable with respect to the administration of this chapter and its powers and functions under this chapter.

(g) Review and audits by Comptroller General

The Comptroller General of the United States shall conduct reviews and audits of the Commission and make reports thereon. For the purpose of conducting such reviews and audits, the Comptroller General shall be furnished such information regarding the powers, duties, organizations, transactions, operations, and activities of the Commission as the Comptroller General may require and the Comptroller General and the duly authorized representatives of the Comptroller General shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of the Commission, except that in reports the Comptroller General shall not include data and information that would

separately disclose the business transactions of any person and trade secrets or names of customers, although such data shall be provided upon request by any committee of either House of Congress acting within the scope of its jurisdiction.

§§ 12-1 to 12-3. Omitted

§ 12a. Registration of commission merchants and brokers; fees; rules and regulations; publication of harmful acts; disapproval of bylaws, etc.

The Commission is authorized:

(1) to register futures commission merchants and persons associated therewith as described in section 6k of this title, commodity trading advisors, commodity pool operators and floor brokers upon application in accordance with rules and regulations and in form and manner to be prescribed by the Commission, which may require the applicant, and any persons associated with the applicant as the Commission may specify, to be fingerprinted and to submit, or cause to be submitted, such fingerprints to the Attorney General for identification and appropriate processing; and

(2) to refuse to register any person—

(A) if the prior registration of such person has been suspended (and the period of such suspension shall not have expired) or has been revoked;

(B) if it is found, after opportunity for hearing, that the applicant is unfit to engage in the business for which the application for registration is made, (i) because such applicant, or, if the applicant is a partnership, any general partner, or, if the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, at any time engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or

Federal court, or was debarred by any agency of the United States from contracting with the United States, or the applicant willfully made any material false or misleading statement in his application or willfully omitted to state any material fact in connection with the application, or (ii) for other good cause shown; or

(C) in the case of an applicant for registration as futures commission merchant, if it is found after opportunity for hearing that the applicant has not established that he meets the minimum financial requirements under section 6f of this title: *Provided,* That pending final determination under subparagraph (B) or (C), registration shall not be granted: *And provided further,* That the applicant may appeal from a refusal of registration under subparagraph (B) or (C) in the manner provided in section 9 of this title; and

(3) in accordance with the procedure provided for in section 9 of this title, to suspend or revoke the registration of any person registered under this chapter if cause exists under paragraph (2)(B) or (C) of this section which would warrant a refusal of registration of such person, and to suspend or revoke the registration or any futures commission merchant who shall knowingly accept any order for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market from any person if such person has been denied trading privileges on any contract market by order of the Commission under the provisions of section 9 of this title and the period of denial specified in such order shall not have expired; and

(4) to fix and establish from time to time reasonable fees and charges for registrations and renewals thereof; and

(5) to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of this chapter; and

(6) to communicate to the proper committee or officer of any contract market, notwithstanding the provisions of section 12 of this title, the full facts concerning any transaction or market operation, including the names of parties thereto, which in the judgement of the Commission disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers and consumers; and

(7) to alter or supplement the rules of a contract market insofar as necesary or appropriate by rule or regulation or by order, if after making the appropriate request in writing to a contract market that such contract market effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such contract market has not made the changes so required, and that such changes are necessary or appropriate for the protection of persons producing, handling, processing, or consuming any commodity traded for future delivery on such contract market, or the product or byproduct thereof, or for the protection of traders or to insure fair dealing in commodities traded for future delivery on such contract market. Such rules, regulations, or orders may specify changes with respect to such matters as:

(A) terms or conditions in contracts of sale to be executed on or subject to the rules of such contract market;

(B) the form or manner of execution of purchases and sales for future delivery;

(C) other trading requirements, excepting the setting of levels of margin;

(D) safeguards with respect to the financial responsibility of members;

(E) the manner, method, and place of soliciting business, including the content of such solicitations; and

(F) the form and manner of handling, recording, and accounting for customers' orders, transactions, and accounts; and

(8) to make and promulgate such rules and regulations with respect to those persons registered under this chapter, who are not members of a contract market, as in the judgment of the Commission are reasonably necessary to protect the public interest and promote just and equitable principles of trade, including but not limited to the manner, method, and place of soliciting business, including the content of such solicitation; and

(9) to direct the contract market whenever it has reason to believe that an emergency exists, to take such action as, in the Commission's judgement, is necessary to maintain or restore orderly trading in, or liquidation of, any futures contract. The term "emergency" as used herein shall mean, in addition to threatened or actual market manipulations and corners, any act of the United States or a foreign government affecting a commodity or any other major market disturbance which prevents the market from accurately reflecting the forces of supply and demand for such commodity: *Provided,* That nothing herein shall be deemed to limit the meaning or interpretation given by a contract market to the terms "market emergency", "emergency", or equivalent language in its own bylaws, rules, regulations, or resolutions.

§ 12b. Trading ban violations; prohibition

It shall be unlawful for any person, against whom there is outstanding any order of the Commission prohibiting him from trading on or subject to the rules of any contract market, to make or cause to be made in contravention of such order, any contract for future delivery of any commodity, on or subject to the rules of any contract market.

§ 12c. Disciplinary actions; notice; review of action by Commission

(1)(A) Any exchange or the Commission if the exchange fails to act, may suspend, expel, or otherwise discipline any person who is a member of that exchange, or deny any person access to the exchange. Any such action shall be taken solely in accordance with the rules of that exchange.

(B) Any suspension, expulsion, disciplinary, or access denial procedure established by an exchange rule shall provide for written notice to the Commission and to the person who is suspended, expelled, or disciplined, or denied access, within thirty days, which includes the reasons for the exchange action in the form and manner the Commission prescribes. An exchange shall make public its findings and the reasons for the exchange action in any such proceeding, including the action taken or the penalty imposed, but shall not disclose the evidence therefor, except to the person who is suspended, expelled, or disciplined, or denied access, and to the Commission.

(2) The Commission may, in its discretion and in accordance with such standards and procedures as it deems appropriate, review any decision by an exchange whereby a person is suspended, expelled, otherwise disciplined, or denied access to the exchange. In addition, the Commission may, in its discretion and upon application of any person who is adversely affected by any other exchange action, review such action.

(3) The Commission may affirm, modify, set aside, or remand any exchange decision it reviews pursuant to paragraph (2) if this section, after a determination on the record whether the action of the exchange was in accordance with the policies of this chapter. Subject to judicial review, any order of the Commission entered pursuant to paragraph (2) of this section shall govern the exchange in its further treatment of the matter.

(4) The Commission, in its discretion, may order a stay of any action taken pursuant to paragraph (1) of this section pending review thereof.

§ 13. Violations generally; punishment; costs of prosecution

(a) Embezzlement, larceny, etc.; felony; value

It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any futures commission merchant, or any employee or agent thereof, to embezzle, steal, purloin, or with criminal intent convert to his own use or the use of another, any money, securities, or property having a value in excess of $100, which was received by such commission merchant to margin, guarantee, or secure the trades or contracts or any customer of such commission merchant or accruing to such customer as the result of such trades or contracts. Notwithstanding the foregoing, in the case of any violation described in the foregoing sentence by a person who is an individual, the fine shall not be more than $100,000, together with the costs of prosecution. The word "value" as used in this paragraph means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

(b) Price manipulation; cornering; postal or interstate dissemination of false or misleading information affecting price of commodity in interstate commerce; felony

It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity, or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, or knowingly to violate the provisions of

section 6, 6b, 6c(b) through 6c(e), 6h, 6o(1), or 23 of this title, or knowingly to make any false or misleading statement of a material fact in any registration application or report filed with the Commission, or knowingly to omit in any application or report any material fact that is required to be stated therein. Notwithstanding the foregoing, in the case of any violation described in the foregoing sentence by a person who is an individual, the fine shall not be more than $100,000, together with the costs of prosecution.

(c) Other violations; misdemeanors

Except as provided in subsections (a), (b), (d), and (e) of this section, it shall be a misdemeanor punishable by a fine of not more than $100,000 or imprisonment for not more than one year, or both, together with the costs of prosecution, for any person to violate any provisions of section 6a, 6c(a), 6d, 6e, 6i, 6k, 6m, 6o(2), or 12b of this title, or to fail to evidence any contract mentioned in section 6 of this title by a record in writing as therein required.

(d) Transactions by Commissioners and Commission employees prohibited

It shall be a felony punishable by a fine of not more than $100,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any Commissioner of the Commission or any employee or agent thereof, to participate, directly or indirectly, in any transaction in commodity futures or any transaction of the character of or which is commonly known to the trade as an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", or for any such person to participate, directly or indirectly, in any investment transaction in an actual commodity: *Provided,* That such prohibition against any investment transaction in an actual commodity shall not apply to a transaction in which such person buys an agricultural commodity or livestock for use in his own farming

or ranching operations or sells an agricultural commodity which he has produced in connection with his own farming or ranching operations nor to any transaction in which he sells livestock which he has owned at least three months. With respect to such excepted transactions, the Commission shall require any Commissioner of the Commission or any employee or agent thereof who participates in any such transaction to notify the Commission thereof in accordance with such regulations as the Commission shall prescribe and the Commission shall make such information available to the public.

(e) Use of information by Commissioners and Commission employees prohibited

It shall be a felony punishable by a fine of not more than $100,000 or imprisonment for not more than five years, or both, together with the costs of prosecution—(1) for any Commissioner of the Commission or any employee or agent thereof who, by virtue of his employment or position, acquires information which may affect or tend to affect the price of any commodity futures or commodity and which information has not been made public to impart such information with intent to assist another person, directly or indirectly, to participate in any transaction in an actual commodity, or in any transaction of the character of or which is commonly known to the trade as an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"; and (2) for any person to acquire such information from any Commissioner of the Commission of any employee or agent thereof and to use such information in any transaction in commodity futures, any transaction in an actual commodity, or in any transaction of the character of or which is commonly known to the trade as an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty".

§ 13-1. Violations, prohibition against dealings in onion futures; punishment

(a) No contract for the sale of onions for future delivery shall be made on or subject to the rules of any board of trade in the United States. The terms used in this section shall have the same meaning as when used in this chapter.

(b) Any person who shall violate the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than $5,000.

§ 13a. Nonenforcement of rules of government or other violations; cease and desist orders; fines and penalties; imprisonment; misdemeanor; separate offenses

If any contract market is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title, or if any contract market, or any director, officer, agent, or employee of any contract market otherwise is violating or has violated any of the rules, regulations, or orders of the Commission thereunder, the Commission may, upon notice and hearing on the record and subject to appeal as in other cases provided for in paragraph (a) of section 8 of this title, make and enter an order directing that such contract market, director, officer, agent, or employee shall cease and desist from such violation, and assess a civil penalty of not more than $100,000 for each such violation. If such contract market, director, officer, agent, or employee, after the entry of such a cease and desist order and the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such contract market, director, officer, agent, or employee shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $100,000 or imprisoned for not less than six months nor more than one year, or both. Each day during which such failure or refusal to obey such cease and desist order continues shall be deemed a separate offense. If the offending contract market or other person upon whom such penalty is imposed, after the lapse of the period allowed for appeal or after the affir-

mance of such penalty, shall fail to pay such penalty, the Commission shall refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court. In determining the amount of the money penalty assessed under this section, the Commission shall consider the appropriateness of such penalty to the net worth of the offending person and the gravity of the offense, and in the case of a contract market shall further consider whether the amount of the penalty will materially impair the contract market's ability to carry on its operations and duties.

§ 13a-1. Action to enjoin or restrain violations; compliance; writs and orders; jurisdiction and venue; process

Whenever it shall appear to the Commission that any contract market or other person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule, regulation, or order thereunder, or is restraining trading in any commodity for future delivery, the Commission may bring an action in the proper district court of the United States or the proper United States court of any territory of other place subject to the jurisdiction of the United States, to enjoin such act or practice, or to enforce compliance with this chapter, or any rule, regulation or order thereunder, and said courts shall have jurisdiction to entertain such actions; *Provided,* That no restraining order or injunction for violation of the provisions of this chapter shall be issued ex parte by said court. Upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Commission, the district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder, including the requirement that such person take such action as is

necessary to remove the danger of violation of this chapter or any such rule, regulation, or order: *Provided,* That no such writ of mandamus, or order affording like relief, shall be issued ex parte. Any action under this section may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or in the district where the act or practice occurred, is occurring, or is about to occur, and process in such cases may be served in any district in which the defendant is an inhabitant or wherever the defendant may be found. In lieu of bringing actions itself pursuant to this section, the Commission may request the Attorney General to bring the action. Where the Commission elects to bring the action, it shall inform the Attorney General of such suit and advise him of subsequent developments.

§ 13a-2. Jurisdiction of States

(1) Whenever it shall appear to the attorney general of any State, the administrator of the securities laws of any State, or such other official as a State may designate, that the interests of the residents of that State have been, are being, or may be threatened or adversely affected because any person (other than a contract market, clearinghouse, or floor broker) has engaged in, is engaging or is about to engage in, any act or practice constituting a violation of any provision of this chapter or any rule, regulation, or order of the Commission thereunder, the State may bring a suit in equity or an action at law on behalf of its residents to enjoin such act or practice, to enforce compliance with this chapter, or any rule, regulation, or order of the Commission thereunder, to obtain damages on behalf of their residents, or to obtain such further and other relief as the court may deem appropriate.

(2) The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia, shall have jurisdiction of all suits in equity and actions at law brought under this section to

enforce any liability of duty created by this chapter or any rule, regulation, or order of the Commission thereunder, or to obtain damages or other relief with respect thereto. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder, including the requirement that the defendant take such action as is necessary to remove the danger of violation of this chapter or of any such rule, regulation, or order. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Immediately upon instituting any such suit or action, the State shall serve written notice thereof upon the Commission and provide the Commission with a copy of its complaint, and the State shall serve written notice thereof upon the Commission action and, upon doing so, shall be heard on all matters arising therein, and (B) file petitions for appeal.

(4) Any suit or action brought under this section in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the act or practice occurred, is occurring, or is about to occur, and process in such cases may be served in any district in which the defendant is an inhabitant or wherever the defendant may be found.

(5) For purposes of bringing any suit or action under this section, nothing in this chapter shall prevent the attorney general, the administrator of the State securities laws, or other duly authorized State officials from exercising the powers conferred on them by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) For purposes of this section, "State" means any State of the United States, the District of Columbia, the Commonwealth

of Puerto Rico, or any territory or possession of the United States.

(7) Nothing contained in this section shall prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal antifraud statute of such State.

§ 13b. Manipulations or other violations; cease and desist orders against persons other than contract markets; punishment; misdemeanor or felony; separate offenses

If any person (other than a contract market) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract markets, or otherwise is violating or has violated any of the provisions of this chapter or of the rules, regulations, or orders of the Commission thereunder, the Commission may, upon notice and hearing, and subject to appeal as in other cases provided for in section 9 of this title, make and enter an order directing that such person shall cease and desist therefrom and, if such person thereafter and after the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such person shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $100,000, or imprisoned for not less than six months nor more than one year, or both, except that if such failure or refusal to obey or comply with such order involves any offense within paragraph (a) or (b) of section 13 of this title, such person shall be guilty of a felony and, upon conviction thereof, shall be subject to the penalties of said paragraph (a) or (b): *Provided,* That any such cease and desist order against any respondent in any case of manipulation of, or attempt to manipulate, the price of any commodity shall be issued only in conjunction with an order issued against such respondent under section 9 of this title. Each day during which

such failure or refusal to obey or comply with such order continues shall be deemed a separate offense.

§ 13c. Responsibility as principal; minor violations

(a) Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this chapter, or any of the rules, regulations, or orders issued pursuant to this chapter, or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of the provisions of this chapter or any of such rules, regulations, or orders may be held responsible in administrative proceedings under this chapter for such violation as a principal.

(b) Nothing in this chapter shall be construed as requiring the Commission to report minor violations of this chapter for prosecution, whenever it appears that the public interest does not require such action.

§ 14. Omitted

§ 15. Enforcement powers of Commission

For the purpose of securing effective enforcement of the provisions of this chapter and for the purpose of any investigation or proceedings under this chapter, any member of the Commission or any Administrative Law Judge or other officer designated by the Commission may administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records that the Commission deems relevant or material to the inquiry. The attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing. In case of contumacy by, or refusal

to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction in which the investigation or proceeding is conducted, or where such person resides or transacts business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. Such court may issue an order requiring such person to appear before the Commission or member or Administrative Law Judge or other officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question. Any failure to obey such order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in the judicial district wherein such person is an inhabitant or transacts business or wherever such person may be found.

§ 15a. Repealed. Pub. L. 95-405, § 24, Sept. 30, 1978, 92 Stat. 877

§ 15b. Cotton futures contracts

(a) Short title

This section may be cited as the "United States Cotton Futures Act".

(b) Repeal of tax on cotton futures

Subchapter D of chapter 39 of title 26 (relating to tax on cotton futures) is repealed.

(c) Definitions

For purposes of this section—

(1) Cotton futures contract

The term "cotton futures contract" means any contract of sale of cotton for future delivery made at, on, or in any

exchange, board of trade, or similar institution or place of business which has been designated a "contract market" by the Commodity Futures Trading Commission pursuant to the Commodity Exchange Act [7 U.S.C. 1 et seq.] and the term "contract of sale" as so used shall be held to include sales, agreements of sale, and agreements to sell.

(2) Future delivery

The term "future delivery" shall not include any cash sale of cotton for deferred shipment or delivery.

(3) Person

The term "person" includes an individual, trust, estate, partnership, association, company, or corporation.

(4) Secretary

The term "Secretary" means the Secretary of Agriculture of the United States.

(5) Standards

The term "standards" means the official cotton standards of the United States established by the Secretary pursuant to the United States Cotton Standards Act, as amended [7 U.S.C. 51 et seq.].

(d) Bona fide spot markets and commercial differences

(1) Definition

For purposes of this section, the only markets which shall be considered bona fide spot markets shall be those which the Secretary shall, from time to time, after investigation, determine and designate to be such, and of which he shall give public notice.

(2) Determination

In determining, pursuant to the provisions of this section, what markets are bona fide spot markets, the Secretary is directed to consider only markets in which spot cotton is sold in such volume and under such conditions as customarily to reflect accurately the value of middling cotton and the differences between the prices or values of middling cotton and of other grades of cotton for which standards shall have been established by the Secretary; except that if there are not sufficient places, in the markets of which are made bona fide sales of spot cotton of grades for which standards are established by the Secretary, to enable him to designate at least five spot markets in accordance with subsection (f)(3) of this section, he shall, from data as to spot sales collected by him, make rules and regulations for determining the actual commercial differences in the value of spot cotton of the grades established by him as reflected by bona fide sales of spot cotton, of the same or different grades, in the market selected and designated by him, from time to time, for that purpose, and in that event differences in value of cotton of various grades involved in contracts made pursuant to subsection (f)(1) and (2) of this section shall be determined in compliance with such rules and regulations, It shall be the duty of any person engaged in the business of dealing in cotton, when requested by the Secretary or any agent acting under his instructions, to answer correctly to the best of his knowledge, under oath or otherwise, all questions touching his knowledge of the number of bales, the classification, the price or bona fide price offered, and other terms of purchase or sale, of any cotton involved in any transaction participated in by him, or to produce all books, letters, papers, or documents in his possession or under his control relating to such matter.

(3) Withholding information

Any person engaged in the business of dealing in cotton who shall, within a reasonable time prescribed by the Secretary or any agent acting under his instructions, willfully fail or refuse to answer questions or to produce books, letters, papers, or documents, as required under paragraph (2) of this subsection, or who shall willfully give any answer that is false or misleading, shall, upon conviction thereof, be fined not more than $500.

(e) Form and validity of cotton futures contracts

Each cotton futures contract shall be a basis grade contract, or a tendered grade contract, or a specific grade contract as specified in subsections (f), (g), or (h) of this section and shall be in writing plainly stating, or evidenced by written memorandum showing, the terms of such contract, including the quantity of the cotton involved and the names and addresses of the seller and buyer in such contract, and shall be signed by the party to be charged, or by his agent in his behalf. No cotton futures contract which does not conform to such requirements shall be enforceable by, or on behalf of, any party to such contract or his privies.

(f) Basis grade contracts

(1) Conditions

Each basis grade cotton futures contract shall comply with each of the following conditions:

(A) Conformity with regulations.—Conform to the regulations made pursuant to this section.

(B) Specification of grade, price, and dates of sale and settlements.—Specify the basis grade for the cotton involved in the contract, which shall be one of the grades for which standards are established by the Secretary, except grades prohibited from being

delivered on a contract made under this subsection by subparagraph (E), the price per pound at which the cotton of such basis grade is contracted to be bought or sold, the date when the purchase or sale was made, and the month or months in which the contract is to be fulfilled or settled; except that middling shall be deemed the basis grade incorporated into the contract if no other basis grade be specified either in the contract or in the memorandum evidencing the same.

(C) Provision for delivery of standard grades only.—Provide that the cotton dealt with therein or delivered thereunder shall be of or within the grades for which standards are established by the Secretary except grades prohibited from being delivered on a contract made under this subsection by subparagraph (E) and no other grade or grades.

(D) Provision for settlement on basis of actual commercial differences.—Provide that in case cotton of grade other than the basis grade be tendered or delivered in settlement of such contract, the differences above or below the contract price which the receiver shall pay for such grades other than the basis grade shall be the actual commercial differences, determined as hereinafter provided.

(E) Prohibition of delivery of inferior cotton.—Provide that cotton that, because of the presence of extraneous matter of any character, or irregularities or defects, is reduced in value below that of low middling, or cotton that is below the grade of low middling, or, if tinged, cotton that is below the grade of strict middling, or, if yellow stained, cotton that is below the grade of good middling, the grades mentioned being of the official cotton standards of the United States, or cotton that is less than seven-

eights of an inch in length of staple, or cotton of perished staple, or of immature staple, or cotton that is "gin cut" or reginned, or cotton that is "repaced" or "false packed" or "mixed packed" or "water packed", shall not be delivered on, under, or in settlement of such contract.

(F) Provisions for tender in full, notice of delivery date, and certificate of grade.—Provide that all tenders of cotton under such contract shall be the full number of bales involved therein, except that such variations of the number of bales may be permitted as is necessary to bring the total weight of the cotton tendered within the provisions of the contract as to weight; that, on the fifth business day prior to delivery, the person making the tender shall give to the person receiving the same written notice of the date of delivery, and that, on or prior to the date so fixed for delivery, and in advance of final settlement of the contract, the person making the tender shall furnish to the person receiving the same a written notice or certificate stating the grade of each individual bale to be delivered and, by means of marks or numbers, identifying each bale with its grade.

(G) Provision for tender and settlement in accordance with government classification.—Provide that all tenders of cotton and settlements therefor under such contract shall be in accordance with the classification thereof made under the regulations of the Secretary by such officer or officers of the Government as shall be designated for the purpose, and the costs of such classification shall be fixed, assessed, collected, and paid as provided in such regulations. The Secretary is authorized to prescribe regulations for carrying out the purposes of this subparagraph and the certificates of the officers of the

Government as to the classification of any cotton for the purposes of this subparagraph shall be accepted in the courts of the United States in all suits between the parties to such contract, or their privies, as prima facie evidence of the true classification of the cotton involved.

(2) Incorporation of conditions in contracts

The provisions of paragraphs (1)(C), (D), (E), (F), and (G) shall be deemed fully incorporated into any such contract if there be written or printed thereon, or on the memorandums evidencing the same, at or prior to the time the same is signed, the phrase "Subject to United States Cotton Futures Act, subsection (f)."

(3) Delivery allowances

For the purpose of this subsection, the differences above or below the contract price which the receiver shall pay for cotton of grades above or below the basic grade[1] in the settlement of a contract of sale for the future delivery of cotton shall be determined by the actual commercial differences in value thereof upon the sixth business day prior to the day fixed, in accordance with paragraph (1)(F), for the delivery of cotton on the contract, established by the sale of spot cotton in the spot markets of not less than five places designated for the purpose from time to time by the Secretary, as such values were established by the sales of spot cotton, in such designated five or more markets. For purposes of this paragraph, such values in the such spot markets shall be based upon the standards for grades of cotton established by the Secretary. Whenever the value of one grade is to be determined from the sale or sales of spot cotton of another grade or grades, such value shall be fixed in accordance with rules and regulations which shall be prescribed for the purpose by the Secretary.

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[1] So in original.

(g)Tendered grade contracts

(1) Conditions

Each tendered grade cotton future contract shall comply with each of the following conditions:

(A) Compliance with subsection (f).— Comply with all the terms and conditions of subsection (f) of this section not inconsistent with this subsection; and

(B) Provision for contingent specific performance.—Provide that, in case cotton of grade or grades other than the basis grade specified in the contract shall be tendered in performance of the contract, the parties to such contract may agree, at the time of the tender, as to the price of the grade or grades so tendered, and that if they shall not then agree as to such price, then, and in that event, the buyer of said contract shall have the right to demand the specific fulfillment of such contract by the actual delivery of cotton of the basis grade named therein and at the price specified for such basis grade in said contract.

(2) Incorporation of conditions in contract

Contracts made in compliance with this subsection shall be known as "subsection (g) Contracts". The provisions of this subsection shall be deemed fully incorporated into any such contract if there be written or printed thereon, or on the memorandum evidencing the same, at or prior to the time the same is signed, the phrase "Subject to United States Cotton Futures Act, subsection (g)".

(3) Application of subsection

Nothing in this subsection shall be so construed as to authorize any contract in which, or in the settlement of or

in respect to which, any device or arrangement whatever is resorted to, or any agreement is made, for the determination or adjustment of the price of the grade or grades tendered other than the basis grade specified in the contract by any "fixed difference" system, or by arbitration, or by any other method not provided for by this section.

(h) Specific grade contracts

(1) Conditions

Each specific grade cotton futures contract shall comply with each of the following conditions:

(A) Conformity with rules and regulations.—Conform to the rules and regulations made pursuant to this section.

(B) Specification of grade, price, dates of sale and delivery.—Specify the grade, type, sample, or description of the cotton involved in the contract, the price per pound at which such cotton is contracted to be bought or sold, the date of the purchase or sale, and the time when shipment or delivery of such cotton is to be made.

(C) Prohibition of delivery of other than specified grade.—Provide that cotton of or within the grade or of the type, or according to the sample or description, specified in the contract shall be delivered thereunder, and that no cotton which does not conform to the type, sample, or description, or which is not of or within the grade specified in the contract shall be tendered or delivered thereunder.

(D) Provision for specific performance.—Provide that the delivery of cotton under the contract shall not be effected by means of "setoff" or "ring" set-

tlement, but only by the actual transfer of the specified cotton mentioned in the contract.

(2) Incorporation of conditions in contract

The provisions of paragraphs (1)(A), (C), and (D) shall be deemed fully incorporated into any such contract if there be written or printed thereon, or on the document or memorandum evidencing the same, at or prior to the time the same is entered into, the words "Subject to United States Cotton Futures Act, subsection (h)".

(3) Application of subsection

This subsection shall not be construed to apply to any contract of sale made in compliance with subsection (f) or (g) of this section.

(i) Liability of principal for acts of agent

When construing and enforcing the provisions of this section, the act, omission, or failure of any official, agent, or other person acting for or employed by any association, partnership, or corporation within the scope of his employment or office shall, in every case, also be deemed the act, omission, or failure of such association, partnership, or corporation, as well as that of the person.

(j) Regulations

The Secretary is authorized to make such regulations with the force and effect of law as he determines may be necessary to carry out the provisions of this section and the powers vested in him by this section.

(k) Violations

Any person who knowingly violates any regulation made in pursuance of this section, shall, upon conviction thereof, be fined not less than $100 nor more than $500, for each violation

thereof, in the discretion of the court, and, in case of natural persons, may, in addition be punished by imprisonment for not less than 30 days nor more than 90 days, for each violation, in the discretion of the court except that this subsection shall not apply to violations subject to subsection (d)(3) of this section.

(l) Applicability to contracts prior to effective date

The provisions of this section shall not apply to any cotton futures contract entered into prior to the effective date of this section or to any act or failure to act by any person prior to such effective date and all such prior contracts, acts or failure to act shall continue to be governed by the applicable provisions of the Internal Revenue Code of 1954 as in effect prior to the enactment of this section. All designations of bona fide spot markets and all rules and regulations issued by the Secretary pursuant to the applicable provisions of the internal Revenue Code of 1954 which were in effect on the effective date of this section, shall remain fully effective as designations and regulations under this section until superseded, amended, or terminated by the Secretary.

(m) Authorization

There are authorized to be appropriated such sums as may be necessary to carry out this section.

§ 16. Commission operations

(a) Cooperation with other agencies

The Commission may cooperate with any Department or agency of the Government, any State, territory, district, or possession, or department, agency, or political subdivision thereof, or any person.

(b) Employment of investigators, experts, Administrative Law Judges, consultants, clerks, and other personnel; contracts

The Commission shall have the authority to employ such investigators, special experts, Administrative Law Judges, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress. The Commission may employ experts and consultants in accordance with section 3109 of title 5, and compensate such persons at rates not in excess of the maximum daily rate prescribed for GS-18 under section 5332 of title 5. The Commission shall also have authority to make and enter into contracts with respect to all matters which in the judgment of the Commission are necessary and appropriate to effectuate the purposes and provisions of this chapter, including, but not limited to, the rental of necessary space at the seat of Government and elsewhere.

(c) Expenses

All of the expenses of the Commissioners, including all necessary expenses for transportation incurred by them while on official business of the Commission, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Commission.

(d) Authorization of appropriations

There are authorized to be appropriated to carry out the provisions of this chapter such sums as may be required for each of the fiscal years during the period beginning October 1, 1978, and ending September 30, 1982.

§ 16a. Development and implementation of plan for user fees; report to and approval by congressional committees

Notwithstanding any other provision of law, the Commodity Futures Trading Commission may develop and implement a plan to charge and collect reasonable fees to cover the estimated cost of regulating transactions under the jurisdiction of the Commission. However, prior to implementing such a plan, the

Commission shall report its intention to do so to the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry. The Commission shall include in its report the feasibility and desirability of collecting such fees. Any plan developed under this section shall not be implemented until approved by the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry. Fees collected under any plan approved under this section shall be deposited in the Treasury of the United States as miscellaneous receipts.

§ 17. Separability of provisions

If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and of the application of such provision to other persons and circumstances shall not be affected thereby.

§ 17a. Separability of 1936 amendment

If any provision of the act of June 15, 1936, ch. 545, 49 Stat. 1491, which amends this chapter, or the application thereof to any person or circumstances is held invalid, the provisions of the section of this chapter which is amended by such provision of said act shall apply to such person or circumstances. No proceeding shall be abated by reason of any amendment to this chapter made by said act but shall be disposed of pursuant to said act.

§ 17b. Separability of 1968 amendment

If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby, and the provisions of the section of this chapter which is amended by such provision of this Act shall apply to such person or

circumstances. Pending proceedings shall not be abated by reason of any provision of this Act but shall be disposed of pursuant to the provisions of this chapter, in effect prior to the effective date of this Act.

§ 18. Complaints against registered persons

(a) Petition

Any person complaining of any violation of any provision of this chapter or any rule, regulation, or order thereunder by any person who is registered or required to be registered under section 6d, 6e, 6j or 6m of this title may, at any time within two years after the cause of action accrues, apply to the Commission by petition, which shall briefly state the facts, whereupon, if, in the opinion of the Commission, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Commission to the respondent, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be prescribed by the Commission.

(b) Investigation and hearing

If there appear to be, in the opinion of the Commission, any reasonable grounds for investigating any complaint made under this section, the Commission shall investigate such complaint and may, if in its opinion the facts warrant such action, have said complaint served by registered mail or by certified mail or otherwise on the respondent and afford such person an opportunity for a hearing thereon before an Administrative Law Judge designated by the Commission in any place in which the said person is engaged in business: *Provided,* That in complaints wherein the amount claimed as damages does not exceed the sum of $5,000, a hearing need not be held and proof in support of the complaint and in support of the respondent's answer may be supplied in the form of depositions or verified statements of fact.

(c) Determination

After opportunity for hearing on complaints where the damages claimed exceed the sum of $5,000 has been provided or waived and on complaints where damages claimed do not exceed the sum of $5,000 not requiring hearing as provided herein, the Commission shall determine whether or not the respondent has violated any provision of this chapter or any rule, regulation, or order thereunder.

(d) Bond requirement when complainant is nonresident; waiver

In case a complaint is made by a nonresident of the United States, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Commission against the complainant on any counterclaim by respondent: *Provided,* That the Commission shall have authority to waive the furnishing of a bond by a complainant who is a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond.

(e) Reparations

If after a hearing on a complaint made by any person under paragraph (a) of this section, or without hearing as provided in paragraphs (b) and (c) of this section, or upon failure of the party complained against to answer a complaint duly served within the time prescribed, or to appear at a hearing after being duly notified, the Commission determines that the respondent has violated any provision of this chapter, or any rule, regulation, or order thereunder, the Commission shall, unless the offender has already made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order direc-

ting the offender to pay to such person complaining such amount on or before the date fixed in the order. If, after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Commission under such rules and regulations as it shall prescribe, unless the respondent has already made reparation to the person complaining, may issue an order directing the respondent to pay to the complainant the undisputed amount on or before the date fixed in the order, leaving the respondent's liability for the disputed amount for subsequent determination. The remaining disputed amount shall be determined in the same manner and under the same procedure as it would have been determined if no order had been issued by the Commission with respect to the undisputed sum.

(f) Enforcement of reparation award

If any person against whom an award has been made does not pay the reparation award within the time specified in the Commission's order, the complainant, or any person for whose benefit such order was made, within three years of the date of the order, may file a certified copy of the order of the Commission, in the district court of the United States for the district in which he resides or in which is located the principal place of business of the respondent, for enforcement of such reparation award by appropriate orders. The orders, writs, and processes of such district court may in such case run, be served, and be returnable anywhere in the United States. The petitioner shall not be liable for costs in the district court, nor for costs at any subsequent state of the proceedings, unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. Subject to the right of appeal under paragraph (g) of this section, an order of the Commission awarding reparations shall be final and conclusive.

(g) Review

Any order of the Commission entered hereunder shall be reviewable on petition of any party aggrieved thereby, by the United States Court of Appeals for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located, under the procedure provided in section 9 of this title. Such appeal shall not be effective unless within 30 days from and after the date of the reparation order the appellant also files with the clerk of the court a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. Such bond shall be in the form of cash, negotiable securities having a market value at least equivalent to the amount of bond prescribed, or the undertaking of a surety company on the approved list of sureties issued by the Treasury Department of the United States. The appellee shall not be liable for costs in said court. If the appellee prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs.

(h) Penalty

Unless the registrant against whom a reparation order has been issued shows to the satisfaction of the Commission within fifteen days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order, he shall be prohibited from trading on all contract markets and his registration shall be suspended automatically at the expiration of such fifteen-day period until he shows to the satisfaction of the Commission that he has paid the amount therein specified with interest thereon to date of payment: *Provided,* That if on appeal the appellee prevails or if the appeal is dismissed the automatic prohibition against trading and suspension of registration shall become effective at the expiration of

thirty days from the date of judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.

(i) Effective date

The provisions of this section shall not become effective until fifteen months after October 23, 1974: *Provided,* That claims which arise within one year immediately prior to the effective date of this section may be heard by the Commission after such fifteen months period.

§ 19. Antitrust laws; anticompetitive means

The commission shall take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of this chapter, as well as the policies and purposes of this chapter, in issuing any order or adopting any Commission rule or regulation, or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 21 of this title.

§ 20. Market reports

(a) Information

The Commission may conduct regular investigations of the markets for goods, articles, services, rights, and interests which are the subject of futures contracts, and furnish reports of the findings of these investigations to the public on a regular basis. These market reports shall, where appropriate, include information on the supply, demand, prices, and other conditions in the United States and other countries with respect to such goods, articles, services, rights, interests, and information respecting the futures markets.

(b) Avoidance of duplication

The Commission shall cooperate with the Department of Agriculture and any other Department or Federal agency which makes market investigations to avoid unnecessary duplication of information-gathering activities.

(c) Furnishing of information; confidentiality

The Department of Agriculture and any other Department or Federal agency which has market information sought by the Commission shall furnish it to the Commission upon the request of any authorized employee of the Commission. The Commission shall abide by any rules of confidentiality applying to such information.

(d) Disclosure of business transactions, trade secrets, or names of customers

The Commission shall not disclose in such reports data and information which would separately disclose the business transactions of any person and trade secrets or names of customers except as provided in section 12 of this title.

§ 21. Registered futures associations

(a) Registration statement

Any association of persons may be registered with the Commission as a registered futures association pursuant to paragraph (b) of this section, under the terms and conditions hereinafter provided in this section, by filing with the Commission for review and approval a registration statement in such form as the Commission may prescribe, setting forth the information, and accompanied by the documents, below specified:

(1) Data as to its organization, membership, and rules of procedure, and such other information as the Commission may by rules and regulations require as necessary or appropriate in the public interest; and

(2) Copies of its constitution, charter, or articles of incorporation or association, with all amendments thereto, and of its bylaws, and of any rules or instruments corresponding to the foregoing, whatever the name, hereinafter in this section collectively referred to as the "rules of the association".

(b) Standards for registration; Commission findings

An applicant association shall not be registered as a futures association unless the Commission finds, under standards established by the Commission, that—

(1) such association is in the public interest and that it will be able to comply with the provisions of this section and the rules and regulations thereunder and to carry out the purposes of this section;

(2) the rules of the association provide that any person registered under this chapter, contract market, or any other person designated pursuant to the rules of the Commission as eligible for membership may become a member of such association, except such as are excluded pursuant to subparagraph (3) and (4) of this paragraph, or a rule of the association permitted under this subparagraph. The rules of the association may restrict membership in such association on such specified basis relating to the type of business done by its members, or on such other specified and appropriate basis, as appears to the Commission to be necessary or appropriate in the public interest and to carryout the purpose of this section. Rules adopted by the association may provide that the association may, unless the Commission directs otherwise in cases in which the Commission finds it appropriate in the public interest so to direct, deny admission to, or refuse to continue in such association any person if (i) such person, whether prior or subsequent to becoming registered as such, or (ii) any person associated with in the meaning of "associated person"

as set forth in section 6k of this title, whether prior or subsequent to becoming so associated, has been and is suspended or expelled from a contract market or has been and is barred or suspended from being associated with all members of such contract market, for violation of any rule of such contract market;

(3) the rules of the association provide that, except with the approval or at the direction of the Commission in cases in which the Commission finds it appropriate in the public interest so to approve or direct, no person shall be admitted to or continued in membership in such association, if such person—

(A) has been and is suspended or expelled from a registered futures association or from a contract market or has been and is barred or suspended from being associated with all members of such contract market, for violation of any rule of such association or contract market which prohibits any act or transaction constituting conduct inconsistent with just and equitable principles of trade, or requires any act the omission of which constitutes conduct inconsistent with just and equitable principles of trade; or

(B) is subject to an order of the Commission denying, suspending, or revoking his registration pursuant to section 9 of this title, or expelling or suspending him from membership in a registered futures association or a contract market, or barring or suspending him from being associated with a futures commission merchant; or

(C) whether prior or subsequent to becoming a member, by his conduct while associated with a member, was a cause of any suspension, expulsion, or order of the character described in clause (A) or (B) which is in effect with respect to such member, and in

entering such a suspension, expulsion, or order, the Commission or any such contract market or association shall have jurisdiction to determine whether or not any person was a cause thereof, or

(D) has associated with him any person who is known, or in the exercise of reasonable care should be known, to him to be a person who would be ineligible for admission to or continuance in membership under clause (A), (B), or (C) of this subparagraph.

(4) the rules of the association provide that, except with the approval or at the direction of the Commission in cases in which the Commission finds it appropriate in the public interest so to approve or direct, no person shall become a member and no natural person shall become a person associated with a member, unless such person is qualified to become a member or a person associated with a member in conformity with specified and appropriate standards with respect to the training, experience, and such other qualifications of such person as the association finds necessary or desirable, and in the case of a member, the financial responsibility of such a member. For the purpose of defining such standards and the application thereof, such rules may—

(A) appropriately classify prospective members (taking into account relevant matters, including type or nature of business done) and persons proposed to be associated with members.

(B) specify that all or any portion of such standard shall be applicable to any such class.

(C) require persons in any such class to pass examinations prescribed in accordance with such rules.

(D) provide that persons in any such class other than prospective members and partners, officers and

supervisory employees (which latter term may be defined by such rules and as so defined shall include branch managers of members) of members, may be qualified solely on the basis of compliance with specified standards of training and such other qualifications as the association finds appropriate.

(E) provide that applications to become a member or a person associated with a member shall set forth such facts as the association may prescribe as to the training, experience, and other qualifications (including, in the case of an applicant for membership, financial responsibility) of the applicant and that the association shall adopt procedures for verification of qualifications of the applicant.

(F) require any class of persons associated with a member to be registered with the association in accordance with procedures specified by such rules (and any application or document supplemental thereto required by such rules of a person seeking to be registered with such association shall, for the purposes of section 9 of this title, be deemed an application required to be filed under this section).

(5) the rules of the association assure a fair representation of its members in the adoption of any rule of the association or amendment thereto, the selection of its officers and directors, and in all other phases of the administration of its affairs.

(6) the rules of the association provide for the equitable allocation of dues among its members, to defray reasonable expenses of administration.

(7) the rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, in general, to

protect the public interest, and to remove impediments to and perfect the mechanism of free and open futures trading.

(8) the rules of the association provide that its members and persons associated with its members shall be appropriately disciplined, by expulsion, suspension, fine, censure, or being suspended or barred from being associated with all members, or any other fitting penalty, for any violation of its rules.

(9) the rules of the association provide a fair and orderly procedure with respect to the disciplining of members and persons associated with members and the denial of membership to any person seeking membership therein or the barring of any person from being associated with a member. In any proceeding to determine whether any member or other person shall be disciplined, such rules shall require that specific charges be brought; that such member or person shall be notified of, and be given an opportunity to defend against, such charges; that a record shall be kept; and that the determination shall include—

(A) a statement setting forth any act or practice in which such member or other person may be found to have engaged, or which such member or other person may be found to have omitted.

(B) a statement setting forth the specific rule or rules of the association of which any such act or practice, or omission to act, is deemed to be in violation.

(C) a statement whether the acts or practices prohibited by such rule or rules, or the omission of any act required thereby, are deemed to constitute conduct inconsistent with just and equitable principles of trade.

(D) a statement setting forth the penalty imposed.

In any proceeding to determine whether a person shall be denied membership or whether any person shall be barred from being associated with a member, such rules shall provide that the person shall be notified of, and be given an opportunity to be heard upon, the specific grounds for denial or bar which are under consideration; that a record shall be kept; and that the determination shall set forth the specific grounds upon which the denial or bar is based.

(10) the rules of the association provide for a fair and equitable procedure through arbitration or otherwise for the settlement of a customer's claims and grievances against any member or employee thereof: *Provided,* That (i) the use of such procedure by a customer shall be voluntary, (ii) the procedure shall not be applicable to any claim in excess of $15,000, (iii) the procedure shall not result in any compulsory payment except as agreed upon between the parties, and (iv) the term "customer" as used in this paragraph shall not include a futures commission merchant or a floor broker.

(c) Suspension of registration

The Commission may, after notice and opportunity for hearing, suspend the registration of any futures association if it finds that the rules thereof do not conform to the requirements of the Commission, and any such suspension shall remain in effect until the Commission issues an order determining that such rules have been modified to conform with such requirements.

(d) Fees and charges

In addition to the fees and charges authorized by section 12a(4) of this title, each person registered under this chapter, who is not a member of a futures association registered pursuant to this section, shall pay to the Commission such reasonable fees and charges as may be necessary to defray the costs of additional regulatory duties required to be performed

by the Commission because such person is not a member of a registered futures association. The Commission shall establish such additional fees and charges by rules and regulations.

(c) Registered persons not members of registered associations

Any person registered under this chapter, who is not a member of a futures association registered pursuant to this section, in addition to the other requirements and obligations of this chapter and the regulations thereunder shall be subject to such other rules and regulations as the Commission may find necessary to protect the public interest and promote just and equitable principles of trade.

(f) Denial of registration

Upon filing of an application for registration pursuant to paragraph (a) of this section, the Commission may by order grant such registration if the requirements of this section are satisfied. If, after appropriate notice and opportunity for hearing, it appears to the Commission that any requirement of this section is not satisfied, the Commission shall by order deny such registration.

(g) Withdrawal from registration; notice of withdrawal

A registered futures association may, upon such reasonable notice as the Commission may deem necessary in the public interest, withdraw from registration by filing with the Commission a written notice of withdrawal in such form as the Commission may by rules and regulations prescribe.

(h) Commission review of disciplinary actions taken by registered futures associations

If any registered futures association takes any disciplinary action against any member thereof or any person associated with such a member of denies admission to any person seeking membership therein, or bars any person from being associated with a member, such action shall be subject to review by the

Commission, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after such action has been taken or within such longer period as the Commission may determine. Application to the Commission for review, or the institution of review by the Commission on its own motion, shall operate as a stay of such action until an order is issued upon such review pursuant to paragraph (k) of this section unless the Commission otherwise orders, after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of affidavits and oral arguments).

(i) Notice; hearing; findings; cancellation, reduction, or remission of penalties

(1) In a proceeding to review disciplinary action taken by a registered futures association against a member thereof or a person associated with a member, if the Commission, after appropriate notice and opportunity for hearing, upon consideration of the record before the association and such other evidence as it may deem relevant—

(A) finds that such member or person has engaged in such acts or practices, or has omitted such act, as the association has found him to have engaged in or omitted, and

(B) determines that such acts or practices or omission to act, are in violation of such rules of the association as have been designated in the determination of the association, the Commission shall by order dismiss the proceeding, unless it appears to the Commission that such action should be modified in accordance with subparagraph (2) of this paragraph. The Commission shall likewise determine whether the acts or practices prohibited, or the omission of any act required, by any such rule constitute conduct inconsistent with just and equitable principles of trade, and shall so declare. If it appears to the Commission that the evidence does not warrant the finding required in clause

(A), or if the Commission determines that such acts or practices as are found to have been engaged in are not prohibited by the designated rule or rules of the association, or that such act as is found to have been omitted is not required by such designated rule or rules, the Commission shall by order set aside the action of the association.

(2) If, after appropriate notice and opportunity for hearing, the Commission finds that any penalty imposed upon a member or person associated with a member is excessive or oppressive, having due regard to the public interest, the Commission shall by order cancel, reduce, or require the remission of such penalty.

(3) In any proceeding to review the denial of membership in a registered futures association or the barring of any person from being associated with a member, if the Commission, after appropriate notice and hearing, and upon consideration of the record before the association and such other evidence as it may deem relevant, determines that the specific grounds on which such denial or bar is based exist in fact and are valid under this section, the Commission shall by order dismiss the proceeding; otherwise, the Commission shall by order set aside the action of the association and require it to admit the applicant to membership therein, or to permit such person to be associated with a member.

(j) Changes or additions to association rules

Every registered futures association shall file with the Commission in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest, copies of any changes in or additions to the rules of the association, and such other information and documents as the Commission may require to keep current or to supplement the registration statement and documents filed pursuant to paragraph (a) of this section. Any change in or addition to the rules of a registered futures association shall be submitted to the Commission for approval and shall take effect upon the thir-

tieth day after such approval by the Commission, or upon such earlier date as the Commission may determine, unless the Commission shall enter an order disapproving such change or addition; and the Commission shall enter such an order unless such change or addition appears to the Commission to be consistent with the requirements of this section and the provisions of this chapter.

(k) Abrogation of association rules; requests to associations by Commission to alter or supplement rules

(1) The Commission is authorized by order to abrogate any rule of a resgistered futures association, if after appropriate notice and opportunity for hearing, it appears to the Commission that such abrogation is necessary or appropriate to assure fair dealing by the members of such association, to assure a fair representation of its members in the administration of its affairs or effectuate the purposes of this section.

(2) The Commission may in writing request any registered futures association to adopt any specified alteration or supplement to its rules with respect to any of the matters hereinafter enumerated. If such association fails to adopt such alteration or supplement within a reasonable time, the Commission is authorized by order to alter or supplement the rules of such association in the manner theretofore requested, or with such modifications of such alteration or supplement as it deems necessary it, after approriate notice and opportunity for hearing, it appears to the Commission that such alteration or supplement is necessary or appropriate in the public interest or to effectuate the purposes of this section, with respect to—

> (A) the basis for, and procedure in connection with, the denial of membership or the barring from being associated with a member or the disciplining of members or persons associated with members, or the qualifications required for members or natural persons associated with members or any class thereof;

(B) the method for adoption of an change in or addition to the rules of the association;

(C) the method of choosing officers and directors.

(l) Suspension and revocation of registration; expulsion of members; removal of association officers or directors

The Commission is authorized, if such action appears to it to be necessary or appropriate in the public interest or to carry out the purposes of this section—

(1) after appropratie notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to revoke the registration of a registered futures association, if the Commission finds that such association has violated any provisions of this chapter or any rule or regulation thereunder, or has failed to enforce compliance with its own rules, or has engaged in any other activity tending to defeat the purposes of this chapter;

(2) after appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to expel from a registered futures association any member thereof, or to suspend for a period not exceeding twelve months or to bar any person from being associated with a member thereof, if the Commission finds that such member or person—

(A) has violated any provision of this chapter or any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was violating with respect to such transaction any provision of this chapter of any rule or regulation thereunder; or

(B) has willfully violated any provision of this chapter, or of any rule, regulation, or order thereunder, or has effected any transaction for any

other person who, he had reason to believe, was willfully violating with respect to such transaction any provision of this chapter or rule, regulation, or order.

(3) after appropriate notice and opportunity for hearing, by order to remove from office any officer or director of a registered futures association who, the Commission finds, has willfully failed to enforce the rules of the association, or has willfully abused his authority.

(m) Rules requiring membership in associations

Notwithstanding any other provision of law, the Commission may approve rules of futures associations that, directly or indirectly, require persons eligible for membership in such associations to become members of at least one such association, upon a determination by the Commission that such rules are necessary or appropriate to achieve the purposes and objectives of this chapter.

(n) Reports to Congress

The Commission shall include in its annual reports to Congress information concerning any futures associations registered pursuant to this section and the effectiveness of such associations in regulating the practices of the members.

§ 22. Research and information programs; reports to Congress

(a) The Commission shall establish and maintain, as part of its ongoing operations, research and information programs to (1) determine the feasibility of trading by computer, and the expanded use of modern information system technology, electronic data processing, and modern communication systems by commodity exchanges, boards of trade, and by the Commission itself for purposes of improving, strengthening, facilitating, or regulating futures trading operation; (2) assist in the development of educational and other informational material regarding futures trading for dissemination and use among producers,

market users, and the general public; and (3) carry out the general purposes of this chapter.

(b) The Commission shall include in its annual reports to Congress plans and findings with respect to implementing this section.

§ 23. Standardized contracts for certain commodities prohibited

(a) Margin accounts, margin contracts, arrangements, etc.

No person shall offer to enter into, enter into, or confirm the execution of, any transaction for the delivery of any commodity specifically set forth in section 2 of this title prior to October 23, 1974, under a standardized contract commonly known to the trade as a margin account, margin contract, leverage account, or leverage contract, or under any contract, account, arrangement, scheme, or device that the Commission determines serves the same function or functions as such a standardized contract, or is marketed or managed in substantially the same manner as such a standardized contract.

(b) Contracts for delivery of silver and gold bullion, bulk silver and gold coins; rules and regulations

No person shall offer to enter into, enter into, or confirm the execution of any transaction for the delivery of silver bullion, gold bullion, or bulk silver coins or bulk gold coins, under a standardized contract described in subsection (a) of this section, contrary to any rule, regulation, or order of the Commission designed to ensure the financial solvency of the transaction or prevent manipulation or fraud: *Provided,* That such rule, regulation, or order may be made only after notice and opportunity for hearing.

(c) Regulation of other commodities under standardized contracts

The Commission may prohibit or regulate any transactions, under a standardized contract described in subsection (a) of this

section, involving any other conditions as the Commission shall initially prescribe by October 1, 1979: *Provided,* That any such order, rule, or regulation may be made only after notice and opportunity for hearing: *Provided further,* That the Commission may set different terms and conditions for such transactions involving different commodities.

(d) Application of provisions to transactions determined to be contracts for future delivery

If the Commission determines that any transaction under subsections (b) and (c) of this section is a contract for future delivery within the meaning of this chapter, such transaction shall be regulated in accordance with the applicable provisions of this chapter.

§ 24. Regulations respecting commodity broker debtors; definition

(a) Notwithstanding title 11, the Commission may provide, with respect to a commodity broker that is a debtor under chapter 7 of title 11, by rule or regulation—

(1) that certain cash, securities, other property, or commodity contracts are to be included in or excluded from customer property or member property;

(2) that certain cash, securities, other property, or commodity contracts are to be specifically identifiable to a particular customer in a specific capacity;

(3) the method by which the business of such commodity broker is to be conducted or liquidated after the date of the filing of the petition under such chapter;

(4) any persons to which customer property and commodity contracts may be transferred under section 766 of title 11, and

(5) how the net equity of a customer is to be determined.

(b) As used in this section, the terms "commodity broker", "commodity contract", "customer", "customer property", "member property", "net equity", and "security" have the meanings assigned such terms for the purposes of subchapter IV of chapter 7 of title 11.

Commodity Futures Trading Commission Reg. 150.10, 17 C.F.R. §150.10

§ 150.10 Limits on position in potatoes for future delivery.

(a) *Position limit.* The limit on the maximum net long or net short position which any one person may hold or control under contracts for future delivery for each separate type of potato, i.e., Round White of Russett Burbank, on or subject to the rules of any one contract market is 300 carlots in any one future and 350 carlots in all futures combined.

(1) However, no person may hold or control a net long or net short position in any one type of potato contract in excess of (i) 150 carlots in the March potato future, (ii) 150 carlots in the April potato future, or (iii) 150 carlots in the May potato future.

(b) *Bona fide hedging.* The foregoing limits upon position shall not be construed to apply to bona fide hedging transactions as defined in § 1.3(z) of this chapter.

(c) *Manipulation: corners; responsibility of contract market.* Nothing contained in this section shall be construed to affect any manipulation or corners, nor to relieve any contract market or its governing board from responsibility under section 5(d) of the Act to prevent manipulation and corners.

(d) *Application of limits.* The foregoing limits upon position shall be construed to apply to positions held by two or more persons acting pursuant to an expressed or implied agreement or understanding, the same as if the positions were held by, or the trading of the positions were done by, a single individual.

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No. 80-895

(Consolidated with Nos. 80-757 and 80-936)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

vs.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

BRIEF OF PETITIONER CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.

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QUESTION PRESENTED FOR REVIEW

Whether traders of commodity futures contracts may invoke the powers of the federal district courts in order to enforce Sections 4a, 4b and 9(b) of the Commodity Exchange Act, 7 U.S.C. §§6a, 6b and 13(b), against a futures commission merchant?

PARTIES BELOW

The parties to the three consolidated appeals below were:

No. 79-7402

Appellants: Neil Leist, Philip Smith and Incomco.

Appellees: Clayton Brokerage Co. of St. Louis, Inc.,* Heinold Commodities, Inc., Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc., New York Mercantile Exchange, Richard B. Levine, Howard Gabler, Alfred Pennisi.

No. 79-7464

Appellant: Incomco.

Appellee: The New York Mercantile Exchange.

No. 79-7482

Appellant: National Super Spuds, Inc.

Appellees: Heinold Commodities, Inc. and Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc.

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* Clayton Brokerage Co. of St. Louis, Inc. ("Clayton"), the Petitioner herein, is a corporation. One hundred percent of the issued and outstanding stock of Clayton is owned by Garnac Grain Co., Inc. ("Garnac"). Clayton has no subsidiaries or affiliated corporations except corporations wholly owned by Clayton or Garnac and ADNAC, Inc., a corporation owned 50% by Garnac.

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No. 80-895

(Consolidated with Nos. 80-757 and 80-936)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

VS.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

BRIEF OF PETITIONER CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.

OPINIONS BELOW

The Opinion and Order of the District Court dismissing the claims of the Respondents herein against Petitioner and others insofar as the claims arose under provisions of the Commodity Exchange Act is published at 470 F.Supp. 1256 and is reprinted in the Joint Appendix (hereinafter "JA") at 60-77. The majority and dissenting Opinions of the Court of Appeals, reversing the judgment of the District Court, are reported at 638 F.2d 283 and reprinted at JA 83-249.

JURISDICTION

This Court has jurisdiction of this case pursuant to 28 U.S.C. §1254(1).

The judgment of the Court of Appeals from which the appeal is taken was entered on July 8, 1980. Petitioner's timely petition for rehearing or rehearing en banc was denied on September 9, 1980 (JA 5). On December 4, 1980, Petitioner timely filed its petition for a writ of certiorari, which this Court granted on February 23, 1981 (JA 6).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The texts of Article I, Section 1 of the Constitution of the United States and the Commodity Exchange Act, 7 U.S.C. §§1-24, as amended, are reprinted in the Appendix to Clayton's Petition For A Writ Of Certiorari at A192-A292.

STATEMENT OF THE CASE

This case arises out of commodity futures trading conducted on the New York Mercantile Exchange (the "Exchange") during the months of March, April and May, 1976 involving contracts requiring the delivery of Maine grown potatoes during the month of May, 1976 (the "May Contract").

The Exchange is a board of trade, designated as a "contract market" by the Commodity Futures Trading Commission (the "CFTC") pursuant to Section 5a of the Commodity Exchange Act (the "CEA"), 7 U.S.C. §7a. The Exchange provides an organized, regulated marketplace for trading contracts for the future delivery of certain commodities.

Petitioner, Clayton Brokerage Co. of St. Louis, Inc. ("Clayton") is a futures commission merchant (an "FCM"), registered as such with the CFTC pursuant to Section 4f of the CEA, 7 U.S.C. §6f. Clayton, as an FCM, acts as a broker for persons desiring to trade commodity futures contracts, buying and selling futures contracts for the accounts of its customers on

the various contract markets of which it is a member, all pursuant to the instructions of its customers.[1]

The Respondents (hereinafter sometimes referred to collectively as the "Long Traders"), at all relevant times, were professional participants in the futures markets. Neil Leist was a member of the Exchange, engaged in trading commodity futures for his own account (JA 16). Incomco was a partnership, duly registered with the CFTC as an FCM (JA 16). Philip Smith was the managing partner of Incomco (JA 16).

During the course of trading in the May Contract, the Long Traders acquired substantial long positions in the May Contract, speculating that the price of the contract would rise, enabling them to liquidate their positions at a profit (JA 100). Various other traders, principally John R. Simplot and Peter J. Taggares and/or companies controlled by them, (the "Short Traders") acquired substantial short positions in the May Contract (JA 27). The Short Traders acquired their positions in the May Contract in their accounts with various FCMs, including Clayton, Heinold Commodities, Inc. ("Heinold") and Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc. ("TMAK") (JA 97).

As the trading in May Contracts came to its scheduled conclusion, the Long Traders liquidated their long positions in the May Contract by selling offsetting short positions in the May Contract (JA 101). This liquidation was completed on or before May 7, 1976, the date futures trading in the May Contract ended in accordance with the Exchange's rules. The Short Traders' positions were not liquidated before the conclusion of trading and, pursuant to the terms of the May Contract, delivery of 50,000 pounds of Maine potatoes was required to satisfy each

[1] More complete descriptions of the functions and operations of the commodity futures markets and the participants are set forth in the Opinion of the Majority in the Court of Appeals 638 F.2d at 286-88, JA 88-94, and in the Opinion of the District Court, 470 F.Supp. at 1258-59, JA 64-66.

unliquidated short position in the May Contract (JA 27). The Short Traders defaulted on their obligations to make the required delivery (JA 27-28).

In September, 1976, the Long Traders commenced this action in the United States District Court for the Southern District of New York, naming as defendants the Short Traders and their FCMs, including Clayton, Heinold and TMAK, the Exchange and certain of its officers, and certain others, all of whom (with the exception of the Exchange and its officers) were alleged to have participated in a conspiracy to manipulate downward the price of the May Contract (JA 26). The conspiracy allegedly violated the provisions of the CEA, 7 U.S.C. §§1-13[2] (JA 26) and Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§1-2 (JA 30), and damaged the Long Traders in the amount of $1,300,000.00 by diminishing the sums received by them on liquidation of their positions in the May Contract. The jurisdiction of the District Court was premised solely upon 28 U.S.C. §§1331, 1337 and Section 4 of the Clayton Antitrust Act, 15 U.S.C. §15 (JA 16).

After discovery, Clayton moved for judgment on the pleadings or alternatively for summary judgment pursuant to Rules 12(c) and 56(b), Fed.R.Civ.P. as to both the claims asserted on the basis of alleged violations of the CEA and the claims asserted on the basis of alleged violations of the Sherman

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[2] Paragraph 60 of the Complaint specifically alleges that "Title 7 U.S.C. Section 13 and rules promulgated by the Commission" were violated (JA 26). The Complaint does not specify which rules of the Commission were allegedly violated or which, if any, other sections of the CEA were allegedly violated. Paragraph 59 of the Complaint (JA 26) alleges that the Defendants engaged in transactions which would and did operate as a fraud and deceit upon purchasers and sellers of Maine potato futures. It is assumed that these allegations were intended to allege a violation of Section 4b. The Court of Appeals treated the case as one in which the following sections of the CEA were at issue: Sections 4a (prohibiting excessive speculation in commodity futures), 4b (prohibiting generally cheating and defrauding of customers), 5(d) (requiring boards of trade to make provisions to prevent manipulation), 5a(8) (requiring boards of trade to enforce their rules), and 9(b) (making manipulation of commodity prices a felony).

Antitrust Act. [3] The District Court granted Clayton's motion in part, dismissing those claims asserted against Clayton which were based on alleged violations of the CEA on the ground that private rights of action against FCMs and boards of trade are not among the remedies available for alleged violations of the CEA.

The Long Traders appealed the Order of the District Court to the Court of Appeals for the Second Circuit.[4] The Court of Appeals, by a 2-1 vote, reversed the Order of the District Court and held that private rights of action are to be implied against FCMs from Sections 4a, 4b[5] and 9(b) of the CEA, 7 U.S.C. §§6a, 6b, 13(b) and against boards of trade from Sections 5(d), 5a(8) and 9(b) of the CEA, 7 U.S.C. §§7(d), 7a(8), 13(b). Judge Mansfield dissented, stating that the Majority's holding rested on a principle of statutory construction which was inapplicable and that it sanctioned the very type of judicial legislation which was rejected, in principle, by this Court in *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11 (1979) and *Touche Ross & Co.* v. *Redington,* 442 U.S. 560 (1979).

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[3] The Exchange and Heinold filed similar motions. TMAK joined in the motions filed by Clayton and Heinold.

[4] The Order of the District Court was entered in respect of claims asserted in several cases all of which arose out of the events described above and were consolidated for pre-trial purposes. The plaintiffs in two other suits, *National Super Spuds, Inc.* v. *New York Mercantile Exchange,* 76 Civ. 2375, 2554, 2571, 2594 (LFM) and *Incomco* v. *New York Mercantile Exchange,* 76 Civ. 2648 (LFM), also appealed from portions of the District Court's Order. The three appeals were consolidated in the Court of Appeals. Clayton was a party only to the appeal in *Leist* v. *Simplot,* No. 79-7402.

[5] The Majority expressly ruled that a private right of action is available for a violation of Section 4b. 638 F.2d at 322, JA 170-71. Apparently, the Majority viewed allegations of the Complaint as sufficient to state a claim based on Section 4b, since it did not affirm the District Court's dismissal of claims arising under Section 4b, but instead indicated that further evidence of the relationships between the plaintiffs and defendants in the District Court would be required to determine whether a violation of Section 4b could be found to have occurred under the facts of this case. 638 F.2d at 323, JA 173.

SUMMARY OF ARGUMENT

The sole question presented is whether a trader of commodity futures contracts has a right of action cognizable in the first instance by a federal district court to recover damages for violations of Sections 4a, 4b or 9(b) of the CEA against a futures commission merchant. Since the asserted right is not expressly conferred by any provision of the CEA, the resolution of the question turns on whether or not Congress affirmatively intended to create that right. *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 15-16 (1979); *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 568 (1979). Evidence of such an intent, if it existed, would be found in the language or structure of the CEA, the legislative history of the statute or the circumstances of its enactment. *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 18. None of these sources discloses any Congressional intent to create private rights of action.

Each of the statutory sections at issue does no more than proscribe certain conduct. None of the provisions creates or alters any civil liabilities, and none, save section 4b, appears by its terms to have been enacted for the benefit of an especial class of persons. Other provisions of the CEA create a panoply of remedies and penalties for violations of these sections of the CEA. These remedies must be presumed to be exclusive. *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. at 19-20.

Sections 4a, 4b and 9(b) were all enacted in 1936, a time at which the courts were narrowly construing statutorily prescribed remedies including those prescribed by the statutory precursor of the CEA. *Wallace* v. *Cutten,* 298 U.S. 229 (1936). Moreover, at the time these provisions were enacted Congress regularly prescribed the remedy it intended to create using express statutory language. *See, e.g.,* 15 U.S.C. §78r. These circumstances demonstrate that Congress did not intend to create a private right of action by implication when it enacted the CEA.

The legislative history of Sections 4a, 4b and 9(b) is silent as to the existence of such rights. The sparse legislative history which exists suggests that when these provisions were enacted, Congress expected private litigants to rely on state rather than federal law to obtain redress for wrongdoing in connection with commodity futures trading.

Subsequent to the enactment of Sections 4a, 4b and 9(b) of the CEA, the CEA was amended, principally in 1974 and in 1978. When these amendments were enacted, Congress refused to enact proposed legislation creating private rights of action similar to those asserted in this case, but created other forms of public and private remedies and eliminated remedies under state law. That rejection of a private right of action confirms that Congress had no intention of creating the private right of action asserted in this case. *National Railroad Passenger Corp.* v. *National Railroad Passenger Ass'n*, 414 U.S. 453 (1974).

ARGUMENT

I.

In Order To Imply A Private Right Of Action From The CEA It Must Be Determined That Congress Affirmatively Intended To Create That Right Of Action

The case presents the question whether traders of commodity futures contracts may invoke the powers of the federal district courts in order to enforce Sections 4a, 4b and 9(b) of the CEA, 7 U.S.C. §§6a, 6b and 13(b), against an FCM.

The CEA expressly specifies several means of redressing violations, but private rights of action such as those found by the Majority in the Court of Appeals are not among them. This Court has long recognized that whether or not a private right of action may be implied from a federal statute is a question to be resolved through a process of statutory construction. *Kissinger* v. *Reporters Committee for Freedom of the Press,* 445 U.S. 136 (1980); *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 15; *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 568; *Cannon* v. *University of Chicago,* 441 U.S. 677, 688 (1979); *National Railroad Passenger Corp.* v. *National Railroad Passenger Ass'n,* 414 U.S. 453, 458. Clayton submits that the majority in the Court of Appeals ignored and misapplied these controlling decisions when it recognized private rights of action on the basis of prior court decisions rather than a considered construction of the CEA.

The principles enunciated in this Court's decisions compel federal courts to conduct a particularized search for Congressional intent to create a private right of action before they imply one. This search may entail examination of the text of the statutory provisions relied on, *Touche Ross & Co.* v. *Redington,* 442 U.S. at 568, the legislative history of the provi-

sions, *National Railroad Passenger Corp.* v. *National Railroad Passenger Ass'n*, 414 U.S. at 458-61, the structure of the statute or the circumstances of its enactment, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 18. The objective of the process, however, is "limited solely to determining whether Congress intended to create the private right of action" asserted. *Touche Ross & Co.* v. *Redington*, 442 U.S. at 568; *accord, Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 27 (White, J., dissenting). Unless this Court finds that Congress affirmatively intended to create the private right of action announced by the Court of Appeals, it must reverse the decision of that Court and reinstate the Judgment of the District Court.

The limitation on the scope of this Court's inquiry and the consequences of the inquiry's failure to disclose an affirmative intention by Congress to create the private right of action asserted are dictated by principles of federal law embodied in the Constitution of the United States.

Neither the Constitution of the United States nor any statute enacted in accordance with the provisions of the Constitution has established the common law as an element of federal law. Thus, as this Court stated in *Erie Railroad* v. *Tompkins*, 304 U.S. 64, 77 (1938), "There is no federal general common law." It necessarily follows that a federal right comes only from legislative grant. The general legal principles which may be relied on to establish a right of action based on state law will not support a right of action based on federal law. *Cf. Touche Ross & Co.* v. *Redington*, 442 U.S. at 568 (rejecting argument that tort principles permit the implication of a private right of action from a federal statute). As Mr. Justice Rehnquist stated in *Cannon* v. *University of Chicago*, "while state courts of general jurisdiction still enforcing the common law as well as statutory law may be less constrained than are federal courts enforcing laws enacted by Congress, the latter must surely look to those laws to determine whether there was an intent to create a private right of action under them." 441 U.S. at 717-18 (concurring opinion).

Article I, Section 1 of the Constitution vests the legislative power of the federal government in the Congress alone. Thus, all positive law of the United States must be enacted by Congress. Congress, of course, cannot legislate by inaction.

Since there is no federal general common law, and since all positive federal law must be enacted by an affirmative act of Congress, any right (other than a Constitutional right) claimed to exist as a matter of federal law must exist by virtue of an affirmative act of Congress - i.e. the enactment of a statute. Where the statute claimed to create the right does not do so in unambiguous terms, a court asked to enforce the claimed right may do so only if it appears that Congress affirmatively intended to establish the right when it enacted the statute. If no affirmative intention to create a right can be discerned, then the absence of the affirmative act of Congress which is constitutionally required to create the right must be presumed. If the Court were to presume otherwise, it would inevitably usurp the prerogative of Congress by interpolating its notions of appropriate policy in the interstices of the statute. *Scripps-Howard Radio* v. *FCC*, 316 U.S. 4, 11 (1942); *TVA* v. *Hill*, 437 U.S. 153, 194 (1978). Accordingly, a party asserting a right claimed to have been conferred by a federal statute which does not, in express terms, create the claimed right, must establish the existence of Congress' affirmative intention, when enacting the statute, to create the right sought to be enforced. *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136; *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11; *Touche Ross & Co.* v. *Redington*, 442 U.S. 560; *Cannon* v. *University of Chicago*, 441 U.S. 677.

Notwithstanding this firmly established principle, the Majority in the Court of Appeals held that the unique question to be decided in this case was not what Congress intended in the first instance but whether or not Congress "intended *sub silentio* to alter the significance" given by a few lower federal courts to the CEA when Congress amended the CEA in 1974. *Leist* v.

Simplot, 638 F.2d at 303, JA 127. According to the Majority, the lower federal courts' entertainment of private civil actions under the CEA prior to 1974 obviated any need to examine whether Congress affirmatively intended to create private rights of action either in the first instance or when the CEA was amended in 1974. This mode of analysis clearly subverts the constitutional principle of separation of powers by circumventing the process of statutory construction dictated by that principle and clearly delineated by this Court's recent decisions. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11; *Touche Ross & Co.* v. *Redington*, 442 U.S. 560. Furthermore, without engaging in any analysis of the Sections of the CEA allegedly violated by Clayton, much less evaluating any other indicia of legislative intent such as the structure of the statute or its legislative history, the Majority determined that a private right of action existed, not just for violations of particular sections of the CEA, but for violations of the CEA generally. 638 F.2d at 303, JA 127-28. The Majority then considered whether the general right of action which it found had been repealed. *Id.*

Before a court can reach the issue of whether Congress intended to repeal a particular federal right it must be established that the right was created by Congress in the first instance. Proper analysis of those factors which demonstrate whether Congress intended to create private rights of action based on Sections 4a, 4b or 9(b) of the CEA compels the conclusion that such rights do not now - and never did - exist.

II.

The Language And Structure Of The Commodity Exchange Act Belie Any Congressional Intention To Create Statutory Rights By Implication

Ordinarily, Congress' intent to grant a particular right will be evident from the text of the statute claimed to confer the right or remedy. *Touche Ross & Co.* v. *Redington*, 442 U.S. 560,

568-69; *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 238 (1969). The text of the CEA, however, is devoid of any indication that Congress intended to create a private right of action to remedy violations of Section 4a, 4b or 9(b) of the CEA. In fact, the CEA, by its express terms, creates a complex and meticulously detailed regulatory scheme which, by its comprehensive nature, evinces Congress' intention to deny such a remedy.

A. Sections 4a, 4b and 9(b) of the CEA are merely proscriptions of certain conduct

Each section of the CEA allegedly violated by Clayton proscribes certain forms of conduct. None of these Sections, however, "in terms create[s] or alter[s] any civil liabilities." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 19. The proscriptive language chosen by Congress has none of the characteristics suggestive of an intention to create the private right of action sought in this case.

1. Section 4a of the CEA

Section 4a prohibits excessive trading in commodity futures contracts. In pertinent part, it provides:

> (1) Excessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets. . . is an undue and unnecessary burden on interstate commerce in such commodity. For the purpose of diminishing, eliminating, or preventing such burden, the commission shall. . . by order, proclaim and fix. . . limits on the amounts of trading which may be done or positions which may be held by any person under contracts of sale of such commodity for future delivery . . . .
>
> (2) The commission shall, in such order, fix a reasonable time after which it shall be unlawful for any person --

. . . .

(B) directly or indirectly to hold or control a net long or a net short position in any commodity for future delivery on or subject to the rules of any contract market in excess of any position limit fixed by the commission for or with respect to such commodity. . . . 7 U.S.C. §6a.

Nothing in the language of this provision suggests that Congress intended that by violating its terms, a person would incur some form of civil liability to private persons. The provision does not void or otherwise impair the validity of transactions which are effected in contravention of its terms. *See Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 17. There is no class of persons designated as the intended beneficiary of the provision,[4] and certainly no focus on such a class. *See Cannon* v. *University of Chicago*, 441 U.S. 677, 691-92. No affirmative rights in any form are conferred by Section 4a. *See Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975). The text of Section 4a is simply devoid of any hallmarks of Congressional intent to create a private right of action.

2. Section 4b of the CEA

Section 4b prohibits contract market members from engaging in certain forms of conduct in connection with transactions in commodity futures contracts. In pertinent part, Section 4b provides:

> It shall be unlawful (1) for any member of a contract market, . . . in or in connection with any order to make, or the making of any contract of sale of any commodity . . . for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making

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[4] If, by looking beyond the express terms of Section 4a, an "especial class" could be found, it would certainly not include speculators such as the Long Traders. Section 4a is "primarily intended to protect outsiders from the activity of all speculators, not speculators from each other." *Liang* v. *Hunt*, 477 F.Supp. 891, 893 (N.D. Ill. 1979).

> of, any contract of sale of any commodity for future delivery. . . for or on behalf of any other person. . .
>
> (A) to cheat or defraud or attempt to cheat or defraud such other person;
>
> (B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;
>
> (C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; . . . . 7 U.S.C. §6b.

The language of Section 4b closely resembles the language of Section 206 of the Investment Advisors Act, 15 U.S.C. §80b-6, considered by this Court in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11. In language similar and, in part, identical to that of Section 206, Section 4b prohibits certain professionals in the industry regulated by the statute from engaging in certain forms of conduct deemed by Congress to be detrimental to the interests of those persons with whom the professionals transact business. It can, therefore, be inferred that Congress enacted Section 4b in order to afford some type of protection to persons transacting business with contract market members. *Id.* at 17.[7] Section 4b, however, is silent as to the nature of the protection which Congress intended to provide. Unlike other statutes which have been found by this Court to have implicitly

[7] The enactment of a federal statute for the benefit of an especial class of persons does not inevitably create a private right of action on behalf of such persons to enforce the statute's provisions. The common law rule which holds to the contrary as to state statutes is simply inapplicable to federal statutes. *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568.

provided for private rights of action, Section 4b does not, of itself, create or alter any affirmative rights, *see, e.g.*, 15 U.S.C. §80b-15, considered in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 18-19 (certain contracts declared void); nor was it drafted with an unmistakable focus on the benefited class, *see, e.g.*, 15 U.S.C. §78j(b), considered in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 728 (1975) ("for the protection of investors"). By its terms Section 4b is merely proscriptive. Its text, therefore, provides no evidence of any Congressional intent to create a private right of action. *Cannon* v. *University of Chicago*, 441 U.S. at 691.

3. Section 9(b) of the CEA

Section 9(b) declares certain forms of conduct, particularly manipulation of commodity prices, to be felonies. In pertinent part, Section 9(b)[4] provides:

> It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, . . . or knowingly to violate the provisions of Section 6, 6b, 6c(b) through 6c(e), 6h, 6o(1), or 23 of this title . . . . 7 U.S.C. §13(b).

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[4] As originally enacted, Section 9 of the CEA declared certain conduct to be a misdemeanor. In 1968, Section 9 was amended. Pub. L. No. 90-258, 82 Stat. 26 (1968). The effect of this amendment was to make manipulation of commodity prices a felony pursuant to what is now Section 9(b) of the CEA, 7 U.S.C. §13(b). The references in 7 U.S.C. §13(b) to Sections "6, 6b, 6c(b) through 6c(e), 6h, 6o(1) or 23" were added by the Futures Trading Act of 1978, Pub. L. No. 95-405, §19(2), 92 Stat. 865, 875 (1978). Prior to that time, violation of those provisions had been a misdemeanor pursuant to Section 9(c) of the CEA, 7 U.S.C. §13(c).

Section 9(b) is similar in form to 18 U.S.C. §610, considered by this Court in *Cort* v. *Ash*, 422 U.S. 66 (1975). Like Section 610, Section 9(b), in terms, "is only a criminal statute, providing a fine or imprisonment for its violation." *Cort* v. *Ash*, 422 U.S. at 74. Section 9(b) does not purport to affect the validity of transactions done in contravention of its terms, creates no affirmative rights on behalf of any person or class of persons, and does not describe any class of persons as its intended beneficiaries. The intended remedy for violations of Section 9(b) is set forth in the text of that provision: fine and/or imprisonment. No mention is made in Section 9(b) of an intended civil remedy to parallel the criminal penalties imposed by Section 9(b). It is simply impossible to discern any Congressional intent to create a private right of action from the text of Section 9(b).

B. The CEA makes express provisions for both public and private remedies for conduct violative of its provisions

Sections 4a, 4b and 9(b) of the CEA were enacted in 1936.[9] Since that time, they have been enforceable through a network of administrative and judicial proceedings prescribed in meticulous detail by other provisions of the CEA. Although the prescribed remedies have been embellished since 1936, the comprehensive nature of the prescribed remedies, both originally and presently, precludes any inference that "Congress absentmindedly forgot to mention an intended private action." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 20, *quoting Cannon* v. *University of Chicago*, 441 U.S. at 742 (Powell, J., dissenting).

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[9] Section 9(b) did not come into existence as a separate subparagraph of Section 9 of the CEA until 1968, when Congress enacted Pub. L. No. 90-258, 82 Stat. 26. A portion of what is now Section 9(b) was enacted as Section 9 of the Grain Futures Act of 1922, ch. 331, 369, 42 Stat. 998 (1922). The critical language of Section 9(b) - that making manipulation of commodity futures prices illegal - was enacted in 1936, pursuant to Section 11(b) of the Commodity Exchange Act, ch. 545, 49 Stat. 1501 (1936).

1. The CEA, as enacted in 1936, made express provision for all remedies determined to be appropriate

Under the CEA as originally enacted, the remedies for violations of Sections 4a and 4b were described in Sections 6(b), 6(c) and 9 (now 9(c)) of the CEA, 7 U.S.C. §§9, 13b, 13(c). Under Section 6(b), the Secretary of Agriculture was empowered to initiate an administrative proceeding to determine whether any person had violated any provision of the CEA. If it was determined that the person had committed a violation of the CEA, the Secretary could bar such person from any further participation in trading conducted on contract markets and, if the person was a registered FCM or floor broker, suspend or revoke his registration as such.[10] Section 6(c) of the CEA authorized the Secretary of Agriculture, after hearings, to enter cease and desist orders against any person found to have manipulated or to have attempted to manipulate the market price of a commodity, or otherwise to have violated the CEA. The violation of a cease and desist order was a crime, punishable by fine and/or imprisonment. Section 9 made violations of Sections 4a or 4b of the CEA a misdemeanor, punishable by fine and/or imprisonment.[11]

Section 9(b) (formerly Section 9) needed no separate provision of the CEA to prescribe a remedy, since by its own terms it imposed penalties of fines and/or imprisonment. Congress did not, however, rely on the harsh sanctions imposed by

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[10] The suspension or revocation of an FCM's or a floor broker's registration effectively precluded such person from pursuing his employment in the industry regulated by the CEA, since registration was made a prerequisite to engaging in business as a FCM or floor broker. *See* 7 U.S.C. §§6d, 6e.

[11] Violation of Section 4b is now a felony, rather than a misdemeanor. *See* note 8 *supra*.

Section 9(b)'s own terms as the exclusive means of enforcing the CEA's proscription of manipulation of commodity prices. The same conduct proscribed by Section 9(b) could also be dealt with in an administrative context pursuant to Section 6(c) of the CEA.

Congress did not create any private remedy for conduct violative of the CEA when it enacted the statute in 1936. Congress did, however, expressly recognize in the text of the CEA that certain private remedies should exist. Section 4c of the CEA provided, in part:

> Nothing in this section or in section 4b shall be construed to impair any state law applicable to any transaction enumerated or described in such sections. 7 U.S.C. §6c (1970) (repealed, 1974).[12]

At that time, traders in commodity futures routinely litigated their claims against one another and their brokers in state courts.[13] It is apparent from Section 4c of the CEA that Congress, in 1936, determined that state courts provided the appropriate forum to adjudicate such disputes and state law provided the appropriate standards to be applied in such adjudication. By contrast, the CEA made no mention of any remedies for conduct violative of Sections 4a and 9(b) of the CEA other than those expressly provided for by the CEA. In light of Congress' meticulous drafting of Section 4c, it must be concluded that Congress did not intend to permit any private remedies for conduct violative of these provisions.[14]

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[12] In 1974, Congress repealed the quoted language of Section 4c. Commodity Futures Trading Commission Act, Pub. L. No. 92-463, §402(d), 88 Stat. 1413 (1974).

[13] *See, e.g., Kouns* v. *Myers,* 118 Kan. 221, 235 P. 122 (1925); *Alexas* v. *Post & Flagg,* 129 S.C. 53, 123 S.E. 769 (1924); *Minnesota Grain Co.* v. *National Wool Growers Dep't,* 152 Minn. 521, 189 N.W. 590 (1922); and *Watkins* v. *W. E. Neiler Co.,* 135 Minn. 343, 160 N.W. 864 (1917).

[14] The legislative history of Section 4c demonstrates that Congress was of the view that but for the express language in Section 4c preserving state law, Sections 4b and 4c of the CEA would have preempted state law. *See* discussion *infra,* at 29-30, n.28.

2. The expansion in 1974 and again in 1978 of the remedies available for violations of the CEA further demonstrates Congressional intent to create a comprehensive regulatory scheme which does not include private rights of action

In 1974, Congress enacted the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (1974) (the "CFTC Act"), amending the CEA. In 1978 the CEA was once again amended by the Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865 (1978) (the "1978 Amendments"). Sections 4a, 4b and 9(b) of the CEA were amended in certain respects by those acts, but those amendments were confined to conforming the terminology used in the text of these provisions to that necessitated by the transfer of the Secretary of Agriculture's duties under the CEA to the CFTC and to increasing the magnitude of the penalties prescribed by Section 9(b). The amendments to sections 4a, 4b and 9(b) did not alter the description of the conduct proscribed by their terms. They did not alter the manner in which the conduct was proscribed. The amendments did not confer any new rights on any especial class of persons, nor did they describe an especial class of persons as the intended beneficiaries of these provisions. Clearly, the amendments do not suggest an intention to change the significance given sections 4a, 4b or 9(b) when these provisions were enacted in 1936. Nevertheless, each court which has addressed the question of whether or not Congress intended to create private rights of action has devoted most of its attention, erroneously we believe, to an analysis of the impact of the amendments to the CEA. It is clear from the changes effected by the CFTC Act and by the 1978 Amendments that the Ninety-Third Congress and the Ninety-Fifth Congress, like the Seventy-Fourth Congress which enacted Sections 4a, 4b and 9(b), did not contemplate that their actions would create a private right of action for violation of those sections.

The CFTC Act altered and embellished the administrative and judicial proceedings available to enforce the provisions of

the CEA, creating an even more complex and meticulously detailed system of enforcement than had existed under the CEA as originally enacted. The most notable changes were the creation of new judicial proceedings to enforce the CEA, the inclusion of provisions expressly creating private remedies as a matter of federal law, and the concomitant elimination of remedies under state law.

The administrative and criminal proceedings previously provided for by Sections 6(b) and 6(c) of the CEA were altered by transferring the powers of the Secretary of Agriculture under those provisions to the CFTC. In addition, pursuant to Section 211 of the CFTC Act, 7 U.S.C. §13a-1, the CFTC was empowered to apply to federal district courts for injunctions enjoining violations of the CEA, and the district courts are specifically empowered to issue such injunctions.

Pursuant to Section 209 of the CFTC Act, 7 U.S.C. §7a(11), each contract market is now compelled to make arbitration available to traders to resolve disputes with contract market members. Pursuant to Section 106 of the CFTC Act, 7 U.S.C. §18, a reparations proceeding conducted by the CFTC was established to permit any person complaining of any violation of the CEA by an FCM, a floor broker,[15] an associated person,[16] a commodity trading advisor[17] or a commodity pool

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[15] Floor brokers are the individuals who actually execute the trades of commodity futures contracts in the trading pits on the floor of the contract markets. They are required to be registered with the CFTC pursuant to 7 U.S.C. §6e.

[16] Associated persons are the employees of FCM's who are responsible for the solicitation or acceptance of an FCM's customer's orders or for supervising persons having such responsibilities. They are required to be registered with the CFTC pursuant to 7 U.S.C. §6k.

[17] Commodity trading advisors are persons who, for separate compensation, provide advice regarding the value of commodities or the advisability of trading commodity futures contracts. They are required to be registered with the CFTC pursuant to 7 U.S.C. §6m.

operator[18] to recover the damages he sustained as a consequence of the violation.[19] The determinations of the CFTC respecting reparations claims are reviewable by the Courts of Appeals, and the judgements rendered by the CFTC are enforceable by the federal district courts. "Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." *Touche Ross & Co.* v. *Redington,* 442 U.S. at 572.

The establishment of these proceedings to permit private persons to obtain redress for violations of the CEA obviated the need for the state law remedies previously preserved by Section 4c of the CEA. Section 402(d) of the CFTC Act, Pub. L. No. 93-463, §402(d), 88 Stat. 1413, repealed the language of Section 4c which, until 1974, had assured that private remedies for conduct violative of the CEA would be avilable if such conduct was actionable on the basis of state law.

The 1978 Amendments were intended to correct perceived shortcomings of the regulatory scheme, including the inability

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[18] Commodity pool operators in the commodity futures industry are roughly analogous to the investment companies in the securities industry. They are required to be registered with the CFTC pursuant to 7 U.S.C. §6m.

[19] As a practical matter, reparations will be available every time the CEA is violated and some person harmed. The registration provisions of the CEA are so broad that it is virtually impossible to effect a transaction in commodity futures without the participation of persons who are registered or required to be registered under the CEA. Section 13 of the CEA, 7 U.S.C. §13c, subjects any person who aids and abets a violation of the CEA to liability as a principal in administrative proceedings under the CEA, such as reparations. Even in the hypothetical situation in which no person registered or required to be registered with the CFTC can be held liable for a violation of the CEA, the *parens patriae* proceedings authorized by 7 U.S.C. §13a-2 may be relied on to secure a remedy on behalf of those injured by the violation. Thus, there is no need for the concern expressed by the Majority in the Court of Appeals, 638 F.2d at 312, JA 148-49, that persons aggrieved by violations of the CEA will be without a remedy.

of state officials to protect their citizenry due to the bar to *parens patriae* suits based on the CEA .[20] This was remedied by Section 15 of the 1978 Amendments which authorizes state officials[21] to bring a proceeding in a federal district court to enjoin violations of the CEA or to recover damages stemming from such violations on behalf of the citizens of the state. 7 U.S.C. §13a-2(1), (2). This provision requires that the CFTC be notified of the institution of the proceedings, and provides the CFTC with an absolute right to intervene in such proceedings. 7 U.S.C. §13a-2(3). If Congress thought it necessary to enact a provision specifically empowering state governments to exercise their prosecutorial powers and enforce the law, it taxes the imagination to suggest that private citizens already had a private right of action to enforce the same statutory provisions even in the absence of an explicit legislative grant.

These changes in the CEA established a comprehensive and pervasive system of regulating the commodity futures industry based entirely on federal law.[22] Except in the cases of imposition of criminal penalties, securing injunctive relief, and under certain limited circumstances, securing recovery of damages for violations of the CEA, all of the regulatory and enforcement machinery envisioned by the drafters of the CEA and its amendments - licensing and registration, rulemaking, enforcement, adjudication of damage claims - has been consolidated and vested in a single independent federal agency, the CFTC. Where the

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[20] *See Extend Commodity Exchange Act: Hearings On H.R. 10285 Before the Subcommittee on Conservation and Credit of the House Committee on Agriculture*, 95th Cong., 2d Sess. 174-75 (1978) (remarks of Conrad Goodkind, Wisconsin Commissioner of Securities).

[21] The designated officials are the attorney general of any state, the administrator of the securities laws of any state, or another official designated by a state. 7 U.S.C. §13a-2(1).

[22] Section 15 of the 1978 Amendments does preserve state law to the limited extent that state officials may enforce the state's antifraud statutes. 7 U.S.C. §13a-2(7). Thus the state's police powers are preserved to a limited extent.

machinery of enforcement is not vested exclusively with the CFTC, i.e., where the courts and/or other government agencies are involved in enforcement, the CFTC is expressly empowered to participate as a party in all cases other than criminal proceedings.

The complex and comprehensive nature of the regulatory scheme explicitly provided for by the CEA in 1936, by the CFTC Act in 1974, and the 1978 Amendments compels the conclusion that Congress did not at any time intend to create some unspecified additional form of remedy for conduct proscribed by Sections 4a, 4b and 9(b) of the CEA. As this Court stated in *Switchman's Union of North America* v. *National Mediation Board,* 320 U.S. 297, 301 (1943), discussing the availability of judicial review to remedy an allegedly erroneous decision of the National Mediation Board made pursuant to Section 2, Ninth of the Railway Labor Act, 45 U.S.C. §152:

> Congress for reasons of its own decided upon the method for the protection of the "right" which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end . . . [i]t is for Congress to determine how the rights which it creates shall be enforced. [Cases omitted]. In such a case the specification of one remedy normally excludes another.

III.

The Circumstances Under Which The CEA And The CFTC Act Were Enacted Preclude The Possibility That Congress, On Either Occasion, Assumed That A Private Right Of Action Would Be Implied From The CEA

This Court has, in the past, concluded on the basis of a peculiar set of circumstances which were extant at the time of a statutory enactment that Congress intended to create a private right of action to remedy particular conduct prohibited by the

statute. *See Cannon* v. *University of Chicago,* 441 U.S. 677. In *Cannon,* the Court found that Congress intended to create a private right of action *when it enacted* Title IX of the Education Amendments of 1972. The Court's conclusion was based on the fact that Title IX was explicitly patterned after Title VI of the Civil Rights Act of 1964. 441 U.S. at 694. When Title IX was enacted, Title VI had been uniformly found to support private rights of action, notwithstanding the absence of any mention of such a remedy in the text of Title VI. Thus, it was apparent to the Court that Congress, *when it enacted* Title IX, must have intended and expected that Title IX would likwise support private rights of action. 441 U.S. at 697-703. The circumstances which surrounded the enactment of the Commodity Exchange Act in 1936 and the CFTC Act in 1974 make it apparent that neither the Seventy-Fourth Congress, which enacted the CEA, nor the Ninety-Third Congress, which enacted the CFTC Act, could have reasonably expected that the Courts would imply a private right of action from the CEA.

During the Congressional term immediately preceding the term in which the CEA was enacted, Congress had enacted the Securities Act of 1933, 15 U.S.C. §§77a *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. §§78a *et seq.* The federal securities laws prescribed in express terms the rights of certain persons to recover damages for violations of certain provisions of these statutes through civil actions in federal district court. *See, e.g.,* 15 U.S.C. §§77k, 1, § 78r. The Congress which enacted the CEA was certainly aware of the new securities laws. The floor debates on the CEA contain express references to those statutes. *See* 79 CONG. REC. 8589 (1935) (statement of Rep. Jones); 80 CONG. REC. 7858-59 (1936) (remarks of Senator Murray). Despite Congress' familiarity with the securities laws which made express provision for such private remedies as were intended to be created thereby, the CEA, as enacted in 1936,

made no provision whatsoever for private enforcement of any of its provisions.[23]

At the time Congress was considering the CEA, the federal courts, including this Court, had adopted a strict approach to construction of federal statutes, including the Grain Futures Act, the precursor of the CEA.[24] In the case of *Cutten* v. *Wallace,* 80 F.2d 140 (7th Cir. 1935), *aff'd sub. nom. Wallace* v. *Cutten,* 298 U.S. 229 (1936), the Court of Appeals for the Seventh Circuit reversed an order of the Secretary of Agriculture entered pursuant to Section 6(b) of the Grain Futures Act, [25] barring Arthur W. Cutten from trading on contract markets. The court's decision was based upon its determination that the Grain Futures Act should be narrowly construed to create a remedy only in the case of ongoing violations of the statute. 80 F.2d at 142-44. The Senate was specifically informed of this narrow construction of the Grain Futures Act's remedial provison, as well as of this Court's decision affirming the Seventh Circuit's decision. *See* 80 CONG. REC. 6160 (1936) (remarks of Senator Connally); 80 CONG. REC. 7858 (1936) (remarks of Senator Murray). The CEA contained a provision amending Section 6(b) of the Grain Futures Act which was specifically intended to alleviate the consequences of the *Cutten* case. 80 CONG. REC. 7858 (1936) (remarks of Senator Murray).

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[23] *Baird* v. *Franklin,* 141 F.2d 238 (2d Cir.), *cert. denied,* 323 U.S. 737 (1944) and *Kardon* v. *National Gypsum Co.,* 69 F.Supp. 512 (E.D.Pa. 1946), implying private rights of action under the federal securities laws, had not been decided when Congress enacted the CEA in 1936. There was no way that Congress could have known, in 1936, that the courts would recognize private rights of action to be implicit in the federal securities laws.

[24] The Commodity Exchange Act, ch. 545, 49 Stat. 1494 (1936), amended and renamed the Grain Futures Act, ch. 369, 42 Stat. 998 (1922).

[25] Section 6(b) of the Grain Futures Act, as amended, is the statutory provision that is now Section 6(b) of the CEA, discussed *supra,* at 17.

When Congress enacted Sections 4a, 4b and 9(b) of the CEA, the implication of private rights of action was confined to the most narrow parameters. *See Cannon* v. *University of Chicago*, 441 U.S. at 732-35 (Powell, J., dissenting). It is inconceivable that a Congress which was enacting legislation which made no express provisions for private remedies, and was intended to amend the Grain Futures Act, the remedial provisions of which had to Congress' knowledge been recently construed by the Supreme Court to be confined to their literal terms, could have thought, much less intended, that courts would recognize a private right of action to be implicit in the provisons of the CEA. *Cf. Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 21 (refusing to imply private damages remedy from Investment Advisors Act, modeled after earlier enacted securities laws which described similar remedies in express terms).

In 1974, while Congress was considering the CFTC Act, this Court decided *National Railroad Passenger Corp.* v. *National Railroad Passenger Ass'n*, 414 U.S. 435, 458 (1974), reiterating the principle that "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." 414 U.S. at 458. Although the decision is not referred to by name in the legislative history of the CFTC Act, reference to the principle enunciated by this Court was made during the Hearings before the Senate Committee on Forestry and Agriculture. *See, e.g. Hearings on S.2483, S.3578, S.2837 and H.R. 13113*, (pt. 3) 93d Cong., 2d Sess. 737, 746 (1974) (statement of Roy A. Schotland). Professor Schotland, speaking of the reparations proceedings, advised the Senate Committee that "if you do choose to retain any such virtually unprecedented responsibility and burden in this regulatory body, there should be explicit language in the statute that federal and state courts are still open if a complainant prefers to go to trial there." *Id.* at 737. As enacted, the section of the CEA establishing the reparations procedure contains no such language.

Unlike the Congress which enacted Section 4c of the CEA preserving substantive state law remedies, the Congress which enacted the CFTC Act did not retain or incorporate into any section of the CEA proscribing any type of conduct or providing for any particular form of remedy a caveat stating or otherwise indicating Congress' intention that the statutory provision was not intended "to impair" the applicability of any other law or to provide the exclusive remedy.[26] In fact, as pointed out above, *supra*, at 21, that Congress repealed the only previously enacted caveat of this type in the CEA. This hardly suggests that Congress could have thought that a private right of action would be implied from the CEA after 1974.

IV.
The Legislative History Of The CEA And Its Amendments Is Devoid Of Any Indication That Congress Intended To Create A Private Right Of Action

Relying on legislative history in divining the intent of Congress is a step to be taken only with great caution. *Department of the Air Force* v. *Rose*, 425 U.S. 352, 388-89 (1976) (Burger, C.J., dissenting). The legislative history of the CEA would have to contain extremely persuasive evidence of a legislative intent to create a private right of action such as the one here asserted in order to overcome the statute's indicia of the absence of any such congressional intent. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 20. The legislative history of the CEA and its amendments, however, simply confirms what analysis of

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[26] Congress did, in 1974, enact a provision which was intended to assure that the CEA would not be construed to pre-empt federal antitrust laws, insofar as they are otherwise applicable to commodity futures trading, or those portions of state law, such as the Uniform Commercial Code, which govern the contract rights which are created as a necessary incident to commodity futures trading. The significance of this provision is discussed *infra* at 36-41.

their texts reveals: Congress did not intend to create private civil actions for damages based on violations of the CEA generally, particularly for violations of Sections 4a, 4b, and 9(b) thereof.

A. The legislative history of the CEA enacted in 1936 demonstrates that there was no intention on the part of the Congress which enacted Sections 4a, 4b and 9(b) to create a private right of action

In all of the various committee reports and floor debates on the Commodity Exchange Act enacted in 1936, there is no indication that even one Congressman who participated in the enactment of that statute in 1936 intended or expected that the CEA would create a private right of action. In fact, there is no mention of private rights of action based on any provision of the CEA. There is no mention of any private remedies for conduct violative of Sections 4a and 9(b) of the CEA. The few references to private remedies which do exist are confined to discussions of Section 4b. Those references indicate that in 1936, Congress deemed it appropriate to leave private remedies for conduct violative of Section 4b to state law.

The first and the only explicit reference to private litigation based on transactions in commodity futures appears in a report of the House Committee on Agriculture on H.R. 12287, an early version of the bill which was to become the Commodity Exchange Act. H.R. Rep. No. 1551, 72d Cong., 1st Sess. 1 (1932). Section 4b of the CEA apparently was first proposed in H.R. 12287. The Report discloses that there was substantial opposition to Section 4b on the basis that cheating and fraud were matters appropriately dealt with under state laws. H.R. Rep. No. 1551, 72d Cong., 1st Sess. 3 (1932). The Report concluded, however, "that those who trade in the futures markets are in no position to obtain the necessary evidence with which to proceed against unscrupulous dealers. They are not even in a position always to know the extent to which they have been cheated by dishonest brokers and commission firms." *Id.*

Section 4b, in conjunction with a proposed amendment to Section 8 of the Grain Futures Act,[27] was seen as a means to alleviate these barriers to effective use of state law remedies for cheating and fraud occurring in connection with commodity futures trading. By making these activities violative of the CEA, Congress brought them within the scope of the broad investigatory and remedial powers given to the Secretary of Agriculture (in whom primary responsibility for enforcing the CEA was vested until 1974) under Section 6 of the Grain Futures Act (now Section 6 of the CEA, 7 U.S.C. §8). The amendment to Section 8 of the Grain Futures Act which was contained in H.R. 12287 required the Secretary of Agriculture to make public the names of persons found, after investigations conducted pursuant to Section 6 of the statute, to have violated Section 4b and authorized the Secretary to issue reports disclosing the facts of the pertinent transactions. H.R. Rep. No. 1551 at 2, 9.

When the CEA was enacted in 1936, amending and renaming the Grain Futures Act, both Section 4b and the amendment to Section 8 of the Grain Futures Act were enacted into law in form substantially identical to that appearing in H.R. 12287. The legislative history of H.R. 6772, the bill which was enacted as the Commodity Exchange Act, ch. 545, 49 Stat. 1491 (1936), confirms that the Congress which enacted Section 4b contemplated that it would function in the same fashion intended when it was first proposed.[28]

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[27] Section 8 of the Grain Futures Act became Section 8 of the CEA, 7 U.S.C. §12, in 1936.

[28] In H.R. Rep. No. 421, 74th Cong., 1st Sess. (1935), the House Committee on Agriculture affirmed its intention that state law should be applicable to certain aspects of commodities transactions, stating:

> Neither section 4b nor section 4c has the effect, in providing for Federal regulation of the transactions prohibited by their terms, of preventing the application of State laws to the acts prohibited and the persons performing them. An express provision is inserted at the end of section 4c indicating that the intention of the law is not to occupy the field to the exclusion of the States.

This legislative history demonstrates that Section 4b was not enacted to create a new form of private remedy for conduct already prohibited by and remediable under state law, but rather to provide a means by which such conduct might be brought to light, assisting those injured to assert their state law remedies. The preservation of an existent private remedy attests that Congress did not intend to create any implied federal remedy.

B. The legislative history of the CFTC Act and the Futures Trading Act Of 1978 confirms the absence of any intent to create a private right of action

Further confirmation that Congress did not intend to create private rights of action against FCMs such as Clayton is found in the legislative history of both the CFTC Act and the 1978 Amendments.

The House Committee on Agriculture's report on the CFTC Act indicates that it was intended to "provide the first complete overhaul of the Commodity Exchange Act since its inception, and proposes a *comprehensive* regulatory structure to oversee the volatile and esoteric future trading complex." H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 1 (1974) (emphasis added). As described above, *supra,* at 19-23, the CFTC Act accomplished its intended purposes.

The 1978 Amendments were essentially designed to cure the weaknesses of the regulatory scheme as those weaknesses were perceived in light of four years' experience with the CFTC Act. The 1978 Amendments made further changes to the enforcement system established by the CEA. The legislative history of

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H.R. Rep. No. 421 at 5. The "express provision" referred to in the Committee's report is the same provision of Section 4c which is quoted at p. 18 *supra*. During the Senate debates on the bill it was confirmed that Section 4b was enacted to provide a means of exposing wrongdoing in the commodity futures markets. *See* 80 CONG. REC. 7911 (1936) (colloquy of Senators Copeland and Smith).

these changes confirm Congress' intention that private rights of action have no place in the regulatory system.

1. Congress rejected importunings to create the remedy now asserted

Testimony received by the congressional committees which were considering the form the CFTC Act should take included suggestions to the committees that the CFTC Act should include a provision expressly establishing a private right of action for damages caused by violations of the Act. *See, e.g., Commodity Futures Trading Commission Act: Hearings Before the Senate Committee on Agriculture and Forestry on S. 2485, S. 2578, S. 2837, and H.R. 13113,* 93d Cong., 2d Sess. 728, 737 (1974) (statements of Jerome P. Weiss and Roy A. Schotland). Even more significantly, one proposed version of the CFTC Act, S. 2837, made express provision for such a private right of action in addition to allowing treble damages for willful violations.[29] Section 505 of that bill read:

CIVIL ACTION FOR DAMAGES

> SEC. 505 (a) Any person who is injured by a violation of any provision of this Act or regulation or order issued thereunder by the Commission or any exchange, may bring a civil action for restitution in any district court having jurisdiction of the party who caused such injury. In any such action, an order of the Commission pursuant to section 406(a)(3) of this Act shall constitute prima facie evidence as to liability between the parties.
>
> (b) Any person who is injured by a willful violation of any provision of this Act, or regulation or order issued thereunder may bring a civil action for threefold the

[29] Two other proposed versions of the CFTC Act, H.R. 11195 and S.2578 also contained provisions which would have expressly established the right of persons injured by violations of the CEA to sue for damages in federal court. Those provisions, however, would have created treble damage actions for any violation of the CEA.

damages sustained by him, and the cost of suit including reasonable attorney's fees, in any district court having jurisdiction of the party who caused such injury. *Commodity Futures Trading Commission Act: Hearings Before the Senate Committee on Agriculture and Forestry on S. 2485, S. 2578, S. 2837, and H.R. 13113*, 93d Cong., 2d Sess. 118-19 (1974) (text of S. 2837, introduced by Senator Hart).

This provision for a private civil action was rejected by Congress when the Senate acceded to the House version of the CFTC Act in 1974.[10]

In 1978, when Congress was reviewing the Act with a view towards further strengthening regulation of the commodity futures industry, Congress was aware that some courts had refused to imply private rights of action from the CEA. 124 CONG. REC. 10537 (1978) (remarks of Senator Huddleston).

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[10] The development of the CFTC Act through its various drafts suggests that the provision creating the reparations proceedings was enacted in lieu of provisions establishing the right of private persons to recover damages through civil lawsuits. The first version of the CFTC Act proposed in the House of Representatives was H.R. 11195, introduced on October 30, 1973. Section 17 of H.R. 11195 would have permitted persons injured by violations of the CEA to recover treble damages from the violator. H.R. 11955, introduced on December 13, 1973, contained most of the same features as H.R. 11195, but contained no provision for private lawsuits based on violations of the CEA. Section 105 of H.R. 11955, however, would have established the reparations proceedings in substantially the same form in which they were ultimately enacted. H.R. 13113, the bill which emerged from the House Committee on Agriculture and was adopted by the House of Representatives, provided for reparations but not private suits. After H.R. 13113 was passed by the House of Respresentatives, it, along with 3 Senate versions of the CFTC Act, S.2485, S.2578, and S.2837, was considered by the Senate Committee on Agriculture and Forestry. Two of the Senate bills, S.2578 and S.2837, contained provisions expressly establishing the right of persons injured by violations of the CEA to sue the violator for damages. Neither of these bills made any provisions for reparations, and S.2485 made no provision for either type of remedy. The Senate adopted H.R. 13113.

Nevertheless, despite making "significant changes in the Act," *S. Rep. No. 95-850*, 95th Cong, 2d Sess. 1 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 1087, 1089, Congress failed to enact any provision which would expressly create a private cause of action.

The legislative histories of the CFTC Act and the 1978 Amendments show that Congress, after being fully informed in 1974 of the desirability of specifically creating a private right of action, rejected bills that would have established a private right of action for violations of the CEA and then, in 1978, again failed to make express provisions for such a right despite the acute awareness of at least those members of the Ninety-Fifth Congress who favored the availability of private rights of action under the CEA that the courts were refusing to recognize such a right of action in the absence of an express provision in the CEA. Where, as here, Congress has rejected a private right of action, the courts should not imply its existence. *National Railroad Passenger Corp.* v. *National Railroad Passengers Ass'n*, 414 U.S. 453.

2. Arbitration and Reparations were the only private remedies contemplated by Congress

The legislative histories of the CFTC Act and the 1978 Amendments demonstrate that, along with the arbitration proceedings which the CFTC Act required contract markets and registered futures associations to implement, the reparations proceedings were viewed by Congress as the only form of private remedy for violations of the Act.

In 1974 the House Committee on Agriculture stated that the reparations procedure is:

> intended as a separate remedy designed to supplement the informal 'settlement procedures' contemplated of contract markets and registered futures associations which are required under other sections of the legislation (H.R. 13113,

> Sections 209 and 301). . . . *It is the intent of the Committee that those complaints which can be resolved informally and settled without a formal proceeding [the reparations proceeding] through the mechanism contemplated of the contract market or a registered futures association should be encouraged to be resolved in such manner.* H.R. Rep. No. 93-975, 93rd Cong., 2d Sess. 22 (1974) (emphasis added).

Elsewhere in the Committee's report the reparations procedure is described as one "under which [the CFTC] will handle customers' complaints arising from violations of the Act, particularly those which result in financial loss to the customers. The Commission will consider *all* such complaints which have not been resolved through the settlement procedures required of exchanges." *H.R. Rep. No. 93-975,* 93d Cong., 2d Sess. 83 (1974) (View of the Department of Agriculture, as reported to House Committee on Agriculture) (emphasis added). It is apparent from the Committee's own statement, the statement of the Department of Agriculture which is apparently endorsed by the Committee, and the complete absence of any reference by the Committee to a civil action in the federal courts, that no private civil action for damages was contemplated.

The legislative history of the 1978 Amendments indicates that Congress, in 1978, still viewed the statutorily prescribed remedies as the only private remedies created by Congress for violation of the CEA. The Senate Report on the 1978 Amendments twice lists the means by which "customers are afforded protection" by the CEA. Private civil actions filed in the courts are conspicuous by their absence from each list. S. Rep. No. 95-850, 95th Cong., 2d. Sess. 12-13, 32 (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 2087-2166, 2101, 2120.

Since Congress has clearly defined the mode of the Long Traders' remedy against Clayton, it would be improper to impute to Congress the intent to create another mode of remedy. *National Railroad Passenger Corp.* v. *National Railroad Passenger Ass'n,* 414 U.S. at 458, *citing Botany Worsted Mills* v. *United States,* 278 U.S. 282, 289 (1929).

V.

There Is No Credible Basis Upon Which To Conclude That Congress Intended To Create Private Rights Of Action In 1974

A. Congress made no atempt to ratify the private rights of action previously implied by courts under the CEA

The Court of Appeals disregarded all of the foregoing indicia that Congress never intended to create private rights of action for violations of Sections 4a, 4b or 9(b). Adopting the arguments of the Respondents and several district courts, the Court of Appeals opined that Congress intended to preserve the private rights of action which had been recognized by the decisions of a few lower federal courts when it enacted the CFTC Act.[31] The "preservation" theory proceeds from the premise that the Ninety-Third Congress was aware of the decision in *Goodman* v. *H. Hentz & Co.*, 265 F.Supp. 440 (N.D. Ill. 1967), and a series of decisions which relied on that case. On that premise, the advocates of the "preservation" theory point to a sentence in Section 201(B) of the CFTC Act, preserving the jurisdiction of state and federal courts, as evidence that Congress intended to preserve the private rights of action recognized in the *Goodman* line of cases. To buttress this argument, the preservationists invoke the familiar canon of statutory construction that the reenactment of a statute incorporates existing constructions of the statute.

This theory ignores the rule clearly enunciated by this Court that affirmative Congressional intent to create the private right of action asserted must be found. *See* discussion *supra*, at 8-11. The preservationists find no specific Congressional intent to create a private right of action evident in the statute or in the

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[31] *Leist* v. *Simplot*, 638 F.2d 283, 322, JA 170. *See also Jones* v. *B. C. Christopher & Co.*, 466 F.Supp. 213, 219 (D. Kan. 1979); *Hofmayer* v. *Dean Witter & Co.*, 459 F.Supp. 733, 737 (N.D. Cal. 1978).

legislative history of the provisions of the CEA at issue in this case. The basis articulated by the Court of Appeals for implying a private right of action was Congress' supposed ratification of lower court decisions recognizing a private right of action for violation of the CEA, which decisions cannot stand the test of the rigorous analyses which must now be applied.[32] The Court of Appeals urged that the climate of the times in an "expansion era"[33] warranted imputing to Congress an intent to create a private right of action. The Court of Appeals failed to recognize that the critical period to which attention must be directed in this case is 1936, the time of the enactment of the statute. Thus, whatever the merit of this test applied to a statute enacted in an "expansion era," the method of analysis wholly fails in this case. Moreover, neither the language nor the legislative history of Section 201(B) of the CFTC Act supports the preservationists' theory, and even a superficial examination of the CFTC Act demonstrates that the "re-enactment" principle is simply inapplicable.

1. Section 201(b) of the CFTC Act simply preserves the ability to enforce state and federal law not otherwise pre-empted by the CEA.

Section 201(b) of the CFTC Act expanded the definition of the term "commodity" as defined in the CEA and defined the jurisdiction of the CFTC. It provides, in pertinent part:

> Sec. 201. Section 2(a) of the Commodity Exchange Act, as amended (7 U.S.C. §§2, 4), is amended -
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> . . .
>
> (b) By striking the period at the end of the third sentence of the section and substituting therefor the following: ". . . *Provided,* That the Commission shall have exclusive jurisdiction with respect to accounts, agreements . . . and

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[32] The "one differentiating fact of transcendent importance" was the existence of these decisions. 638 F.2d at 303, JA 127.

[33] 638 F.2d at 296-99, JA 113-20.

> transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 5 of this Act or any other board of trade, exchange, or market, . . . *And provided further,* That, except as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State. Nothing in this Act shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade. Pub. L. No. 93-463, §201, 88 Stat. 1395 (1974) (emphasis added).

The proponents of the preservation theory rely on the underscored language of this section as an indication that Congress intended to preserve the private right of action recognized in the *Goodman* case. The language will not support the burden sought to be placed on it.

The language in question does not deal with the creation or abrogation of substantive rights, it merely deals with the subject matter jurisdiction of courts to enforce such substantive rights as have been otherwise created and preserved. By its terms, the language of Section 201(b) relied on to support the preservation theory does no more than assure that the vesting of exclusive jurisdiction in the CFTC which is accomplished by Section 201(b) does not deprive state or federal courts of the subject

matter jurisdiction otherwise conferred on them. Evaluation of the statutory scheme of the CEA demonstrates that this was essential since the areas of law pre-empted by the CEA's occupation of the field are not correlative with the "exclusive jurisdiction" which would have been conferred on the CFTC but for the qualifying language in Section 201(b).

The CEA establishes a pervasive system of regulating the manner in which trading in commodity futures contracts is conducted. Either the CEA itself or the regulations promulgated by the CFTC pursuant to its authority conferred by the CEA regulates virtually every aspect of a transaction in commodity futures from the disclosure an FCM is required to make to a prospective cutomer before the customer can trade commodity futures contracts through the FCM, *see* 17 C.F.R. §1.55 (1980), through the manner in which a customer's order is handled by the FCM and the floorbroker, *see* 7 U.S.C. §§6b, 6c; 17 C.F.R. §§155, 166 (1980), to the manner in which the customer's funds must be handled and the transaction confirmed to the customer. *See* 7 U.S.C. §6b. The CEA, however, does not establish a body of substantive law which governs the rights acquired by the parties to a commodity futures contract pursuant to the terms of that contract.[14] Consequently, the CEA does not occupy the field in this area of law and state laws, such as the U.C.C., which govern such contract rights, are not pre-empted and remain applicable to commodity futures contracts.

Section 2 of the CEA, as amended by the CFTC Act, 7 U.S.C. §2, confers exclusive jurisdiction on the CFTC over all transactions involving commodity futures contracts. The CEA does not, however, establish any means by which the CFTC may

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[14] Section 5a of the CEA, 7 U.S.C. §7a, does require that contract markets include certain terms in the futures contracts traded on the exchange floor. These provisions do not, however, provide a means of determining compliance with the terms of a traded contract, nor specify all of the contract's terms. They only specify certain terms which must be included in the contract.

adjudicate any claims except those based upon a violation of the CEA or any rule, regulation or order thereunder. *See* 7 U.S.C. §18. Assuming, then, that a dispute arose between the parties to a futures contract concerning the performance required under the terms of that contract, the CFTC would not have any means of adjudicating the dispute.

The language of Section 2 of the CEA which qualifies the grant of exclusive jurisdiction of the CFTC by expressly preserving the jurisdiction of the courts assures the availability of a forum in which such disputes based on state law may be adjudicated. Without such a forum, the provisions of commodity futures contracts would be, as a practical matter, unenforceable.

The legislative history of the qualifying language on which the "preservation" theory is based confirms that the critical language was inserted in Section 201(b) of the CFTC Act to preserve the availability of a forum. Section 201 of the CFTC Act originated in H.R. 13113. After the House of Representatives adopted H.R. 13113, it was realized that Section 201(b) of H.R. 13113 might raise serious questions of ousting state courts of their jurisdiction over contractual claims arising under commodity futures contracts, elimination of the jurisdiction of federal courts over antitrust claims arising in conection with the commodity futures industry, and preclusion of judicial review of administrative proceedings. The Hon. Peter W. Rodino, Jr., Chairman of the House Committee on the Judiciary, discussed these problems during his testimony before the Senate Committee on Agriculture and Forestry. During the testimony, he proposed that Section 201(b) be amended by the Senate by adding qualifying language substantially identical to that now included in Section 2 of the CEA.[11] No concern that this provision might

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[11] Chairman Rodino's explanation of the problem and proposal to solve the problem was made as follows:

eliminate private rights of action under the Act was even suggested, and there was certainly no indication that the additional

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One of the bills before this Committee during these hearings is H.R. 13113 "Commodity Futures Trading Commission Act of 1974" that passed the House on April 11, 1974 . . .

Section 201(B) of H.R. 13113 provides in relevant part,

"*Provided.* That the Commission shall have exclusive jurisdiction of transactions dealing in, resulting in, or relating to contracts of sale of a commodity for future delivery, traded or executed on a domestic board of trade or contract market or on any other board of trade, exchange, or market; *And provided further,* That nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission or other regulatory authorities under the laws of the United States or restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with the laws of the United States."

This double proviso could be construed to raise a question of federal pre-emption of the commodity futures industry and, therefore, unnecessarily raises a question of federal-State relationships. Many of the millions of commodity futures contracts are presently enforceable in State courts under recognized commercial law and contract principles. This double proviso could, in effect, deprive State courts of their current jurisdiction. There does not appear to be any legislative intention or established need to achieve this pre-emption. . . .

In addition, this double proviso could possibly be read as an attempt to oust even federal courts of jurisdiction. The first proviso confers "exclusive jurisdiction" on the Commission for commodity transactions. Exceptions to this exclusive jurisdiction are carved out in the second proviso without, however, referring to federal district courts. That such a result was not intended in the House is readily apparent from the House action striking the original antitrust exempting provison: antitrust laws are to apply to commodity transactions and, of course, federal courts play an instrumental role in promoting as well as protecting the national policies expressed already in the antitrust laws. Arguably, too, if jurisdiction of federal courts were to be withdrawn also, Commission decisions on commodity transactions would be non-reviewable by the judiciary raising, thereby, serious questions of administrative and constitutional law.

language proposed by Chairman Rodino would somehow preserve a right of action based on the CEA, as distinguished from the preservation of a court's jurisdiction.

It would be astonishing if Chairman Rodino, who was responsible for proposing the language relied on by the preservationists, or any other member of Congress imagined they were in some manner acting to preserve a substantive statutory right supposed to have been conferred by the CEA by acting to preserve the subject matter jurisdiction of the state and federal courts established by constitutional and statutory provisions not part of the CEA. As this Court reiterated in *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 577, a jurisdictional provision "creates no cause of action of its own force and effect; it imposes no liabilities. The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the [statute] which they seek to enforce, not in the jurisdictional provision."

Indeed, it is clear that Congress did not intend the sentence in question to have any impact on the substantive provisions of the CEA contained in other sections of the statute. The sentence begins "Nothing in *this section* . . . ." By contrast, the very next sentence of Section 201(B) begins "Nothing in *this Act* . . . ."

> . . . If it appears advisable to retain rather than to delete the double proviso of Section 201(B) of H.R. 13113, it would seem reasonable to amend the second proviso appropriately to define the jurisdiction, including antitrust jurisdiction, of federal courts for commodity transactions. In this regard, the second proviso could be amended to provide:
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> "*And provided further,* That nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission or other regulatory authorities *and on federal court* . . . ."

Commodity Futures Trading Commission Act: Hearings Before The Senate Committee on Agriculture and Forestry on S. 2485, S. 2578, S. 2837, and H.R. 13113, 93d Cong., 2d Sess. (pt. 1) 259-60 (1974) (statement of Hon. Peter W. Rodino, Jr.) (emphasis added).

Had Congress intended the sentence relied on to affect the impact or construction of other provisions of the CEA, particularly those on which the decision in the *Goodman* case and its progeny were based, it surely would not have utilized such confining language.

2. The CFTC Act did not re-enact any provision of the CEA

The proponents of the "preservation" theory also argue, without any support from the text of the CFTC Act or its legislative history, that it must be presumed that Congress intended to preserve the right of action recognized in *Goodman* because it did not expressly repudiate that decision. The rationale for this conclusion is supposedly provided by the familiar canon of statutory construction, recited in *Van Vranken* v. *Helvering*, 115 F.2d 709, 710 (2d Cir.), *cert. denied*, 313 U.S. 585 (1940), that the re-enactment of a statute is presumed to incorporate prior judicial interpretations. This argument is wholly without merit.

Congress did not re-enact any provision of the CEA when it enacted the CFTC Act.[36] Although one proposed version of the CFTC Act, S. 2485, would have repealed the CEA as it existed in 1974 and enacted an entirely new statute which would have included provisions substantially identical to Sections 4a, 4b and 9(b),[37] Congress did not follow this approach. Rather, it amended the CEA. Congress' affirmative action in amending Sections 4a, 4b and 9(b) in 1974 did not alter the nature of the conduct proscribed by those sections or the manner in which such conduct was proscribed.[38] Since the Ninety-Third Congress

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[36] In 1922, Congress did enact the Grain Futures Act, portions of which had been included in a predecessor statute, the Futures Trading Act, a statute ruled unconstitutional by this Court in *Hill* v. *Wallace*, 259 U.S. 44 (1922).

[37] *See Commodity Futures Trading Commission Act: Hearings before the Committee on Agriculture and Forestry on S. 2485, S. 2578, S. 2837 and H.R. 13113*, 93rd Cong., 2d Sess. 2, 9, 12, 48 (1974).

[38] *See* discussion *supra*, at 19.

did not put its imprimatur on the language of Sections 4a, 4b and 9(b) by re-enacting that language, there is simply no basis for application of the canon relied on by the Majority in the court below.[39]

Had Congress in fact re-enacted Sections 4a, 4b and 9(b) of the CEA, the canon of construction relied on would not be sufficient to support the decision of the Court of Appeals in this case. In *Van Vranken*, 115 F.2d at 711, the court, speaking through Judge Learned Hand, refused to apply the canon to the circumstances there present, emphasizing that:

> The canon which the taxpayer invokes is sometimes a help, but we must never ignore the more important, though impalpable, factors. Indeed, nothing is so likely to lead us astray as an abject reliance upon canons of any sort; so much the whole history of verbal interpretations teaches, if it teaches anything.

The canon must not prevent the courts from correcting erroneous doctrine. As this Court stated in *Helvering* v. *Hallock*, 309 U.S. 106, 119-21 (1940):

> Nor does want of specific congressional repudiations of the *St. Louis Union Trust Co.* cases serve as an implied instruction by Congress to us not to reconsider, in the light of new experience, whether those decisions, in conjunction with the *Klein* case, make for dissonance of doctrine. It would require very persuasive circumstances enveloping congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to

[39] Even if the Ninety-Third Congress had re-enacted Sections 4a, 4b and 9(b) of the CEA, the evidence is overwhelming that Congress did not intend private rights of action like that asserted by the Long Traders to be available. *See* discussions *supra*, at 19-23, 26-27, 30-34, and *Leist* v. *Simplot*, 638 F.2d at 323-24, JA 174-177 (Mansfield, J., dissenting).

> venture into speculative unrealities . . . . *Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction . . . of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle. (emphasis added).*

Accord, Girouard v. *United States,* 328 U.S. 61, 69-70 (1946). As discussed below, *infra,* at 45-47, the pre-CFTC Act decisions of the courts which recognized private rights of action based on conduct violative of the CEA were erroneously decided. Congress cannot be presumed by its silence to have intended to approve and adopt incorrect decisions of lower federal courts. It is apparent, therefore, that the Majority below and those other courts which rely on the ratification rationale erroneously invoked that canon of statutory interpretation.

B. It is unnecessary to find that the CFTC Act repealed the private rights of action previously implied from the CEA

The Majority in the Court of Appeals held that the resolution of the question before this Court depends upon whether Congress, by enacting the CFTC Act, repealed the private rights of action previously implied from the Commodity Exchange Act by certain federal courts. *Leist* v. *Simplot,* 638 F.2d 283, 303, JA 126-28. *See also Alken* v. *Lerner,* 485 F.Supp. 871, 977 (D. N.J. 1980). This argument is tantamount to holding that once a private right of action has been implied from a federal regulatory statute by a few federal courts,[40] it exists as a

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[40] Prior to the enactment of the CFTC Act, several reported cases recognized, in one respect or another, that a private right of action might be implied from the Act. *Seligson* v. *New York Product Exch.,* 378 F.Supp. 1076 (S.D.N.Y. 1974); *Arnold* v. *Bache & Co.,* 377 F. Supp. 61 (M.D. Pa. 1973); *Johnson* v. *Arthur Espey, Shearson, Hammil & Co.,* 341 F.Supp. 764 (S.D.N.Y.1972); *McCurnin* v. *Kohlmeyer & Co.,* 340 F.Supp. 1338 (E.D.La. 1972); *Anderson* v. *Francis I. du-*

statutory right which can only be retracted by Congress and not by this Court.

This argument, however, is hopelessly flawed because its premise is erroneous. Notwithstanding the decisions of several courts which recognized or gave effect to purported private rights of action based on the CEA, no such right of action has ever, in fact, existed.

Pont & Co., 291 F.Supp. 705 (D.Minn. 1968); *Goodman* v. *H. Hentz & Co.*, 265 F.Supp. 440 (N.D. Ill. 1967). In *Seligson*, the court paid lip service to the proposition that a private right of action was an available remedy for violations of the Act, but then ruled that it was unavailable to the plaintiff. In *McCurnin*, the court initially recognized the possibility that a private right of action under the Act would be available to the plaintiff. That plaintiff's claim under the Act, however, was subsequently rejected by the court. *McCurnin* v. *Kohlmeyer & Co.*, 347 F.Supp. 573 (E.D. La. 1972), *aff'd*, 477 F.2d 113 (5th Cir. 1973).

Only three circuit Courts of Appeal even arguably addressed this issue prior to the enactment of the CFTC Act. *Deaktor* v. *L. D. Schrieber & Co.*, 479 F.2d 529 (7th Cir.1973); *McCurnin* v. *Kohlmeyer & Co.*, 477 F.2d 113 (5th Cir.1973); *Booth* v. *Peavey Company Commodity Servs.*, 430 F.2d 132 (8th Cir. 1970). *Deaktor* was reversed on other grounds on appeal to the Supreme Court. *Chicago Mercantile Exch.* v. *Deaktor*, 414 U.S. 113 (1973). The Supreme Court, on review, did not address the issue of whether the private right of action under the Act asserted by the plaintiff was, in fact, available. The Court of Appeals' decision in *McCurnin* affirmed a decision dismissing the plaintiff's claims under the Act. The Court declined to elaborate on the reasons for its decision. In *Booth*, the court raised the issue of the existence of a private right of action under the Act on its own initiative and apparently decided the issue without the benefit of arguments from counsel, based on the precedent of the erroneously decided *Goodman* case.

Of the utmost importance is the fact that this Court never directly addressed the issue before 1974. In what appears to be the only case to date in which the issue could have been decided by this Court, the Court directed that the case should have been "routed in the first instance to the Commodity Exchange Commission" (a predecessor to the CFTC). *Chicago Mercantile Exch.* v. *Deaktor*, 414 U.S. at 115.

From 1936 until 1974 the basic substance of the CEA remained unchanged. For the first thirty-one years of this period, its provisions were enforced solely by the means prescribed by the statute. In 1967, the District Court for the Northern District of Illinois was presented with what it perceived to be a novel argument: that a private right of action existed based upon the CEA. The court came to the equally novel conclusion that a private right of action to recover damages stemming from conduct violative of the CEA was available based on federal law "even in the absence of specific mention of a civil remedy in the Commodity Exchange Act." *Goodman* v. *H. Hentz & Co.*, 265 F.Supp. at 447. The *Goodman* court made no determination that Congress intended to establish a private remedy for violation of the CEA. Instead, it found that the violation of the CEA was actionable under the principle set forth in *Restatement of Torts* §286. *Id.* The *Goodman* court's decision was based upon clearly erroneous reasoning. A federal statutory cause of action cannot be implied on the basis of tort principles. *Touche Ross & Co.* v. *Redington*, 442 U.S. at 568. For this reason, and because it is unquestionably the law that private rights of action cannot be implied in the absence of a demonstrated affirmative intent by Congress, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, the *Goodman* court's decision is simply wrong.

After the decision in *Goodman* was published, a few other courts announced decisions which upheld plaintiffs' contentions that a private right of action was available to remedy violations of the CEA. These decisions either relied uncritically on the precedent of the *Goodman* case or followed the same rationale. *See, e.g., Booth* v. *Peavey Company Commodity Services*, 430 F.2d 132, 133 (8th Cir. 1970); *Arnold* v. *Bache & Co.*, 377 F.Supp. 61, 65 (M.D. Pa. 1973); *Anderson* v. *Francis I. duPont & Co.*, 291 F.Supp. 705, 710 (D. Minn. 1968). But none of these courts, nor any other court, expressed the opinion that Congress affirmatively intended to create a private right of action for violation of the CEA. Indeed, as the *Goodman* court

conceded, no such intent could be discerned from the statute or the legislative history. *Goodman* v. *H. Hentz & Co.*, 265 F.Supp. at 447.

Most importantly, the pre-1974 decisions which implied the existence of private rights of action under the CEA did not *create* any private right of action. As a matter of constitutional law, they could not, since the creation of statutory rights of action is a power vested exclusively with the legislature. *See* discussion *supra*, at 8-11. Rather than creating private rights of action for violation of the CEA, the repeated enforcement of these non-existent rights only perpetuated an unconstitutional and, therefore, invalid usurpation of legislative authority by the courts. The unconstitutionality of the course pursued is clear and its abandonment is compelled. *See Cannon* v. *University of Chicago*, 441 U.S. at 742 (Powell, J., dissenting); *Erie Railroad* v. *Tompkins*, 304 U.S. 64, 77-78 (1938).

The Majority below nevertheless determined that because the purported right of action was recognized by the courts prior to the enactment of the CFTC Act and was not expressly repealed therein, courts should recognize its existence. This conclusion, however, is premised upon the existence of the right of action in the first instance. To avoid repeal, there must necessarily be something to be repealed. But the right of action here asserted is not founded on any express provision in the CEA. Thus, there was no statutory language creating the right of action (by implication or otherwise) which might have been repealed to eliminate the fictitious right of action. The failure to repeal a non-existent right of action by failing to retract non-existent statutory language can hardly be an appropriate basis for subsequently implying the existence of a right of action.

CONCLUSION

For the foregoing reasons, Petitioner Clayton Brokerage Co. of St. Louis, Inc. respectfully requests that this Court vacate the Judgment of the Court of Appeals and reinstate the Judgment of the District Court.

Respectfully submitted,

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In the
Supreme Court of the United States
October Term, 1981

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

vs.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF OF PETITIONER CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.*

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* Clayton Brokerage. Co. of St. Louis, Inc. ("Clayton"), the Petitioner herein, is a corporation. One hundred percent of the issued and outstanding stock of Clayton is owned by Garnac Grain Co., Inc. ('Garnac"). Clayton has no subsidiaries or affiliated corporations except corporations wholly owned by Clayton or Garnac and ADNAC, Inc., a corporation owned 50% by Garnac.

ARGUMENT

I.

INTRODUCTION

These consolidated cases present the question whether the Commodity Exchange Act, 7 U.S.C. §1 et seq., (the "CEA") provides private rights of action to recover damages stemming from violations of various Sections[1] of the CEA allegedly committed by futures commission merchants, contract markets and/or their officials.[2] None of the Respondents, their supporting *amici curiae* or the members of the majorities in the Courts of Appeals here and in *Curran*, contend that there is any evidence that Congress intended to create the private rights of action asserted in these cases when it enacted the statutory provisions allegedly violated by the Petitioners. In the absence of such evidence, the well settled principles of statutory construction repeatedly enunciated by this Court in recent cases[3] compel the conclusion that no unmentioned private right of action is available to remedy violations of the CEA. Nevertheless, Respondents ad-

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[1] Sections 4a, 4b, 5(d), 5a(8) or 9(b), 7 U.S.C. §§6a, 6b, 7(d), 7a(8), 13(b).

[2] A similar issue is presented in the tandem case of *Merrill Lynch, Pierce Fenner & Smith, Inc.* v. *Curran*, Docket No. 80-203.

[3] *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, ... U.S. ...., 69 L.Ed.2d 435 (1981); *California* v. *Sierra Club*, ... U.S. ...., 68 L.Ed.2d 101 (1981); *Universities Research Association, Inc.* v. *Coutu*, ... U.S. ...., 67 L.Ed.2d 662 (1981); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979).

vance two novel arguments in support of now implying private rights of action from the CEA.

First, Respondents, like the Majority in the Court of Appeals, contend that enactment of the Commodity Futures Trading Commission Act (the "CFTC Act")[4], amending the CEA, compels a different analytical approach from that taken in prior cases in which implied private rights of actions were at issue.[5] Instead of determining whether Congress ever intended to create the private rights of action at issue in these cases, Respondents urge this Court to limit its inquiry to whether Congress, in enacting the CFTC Act, intended to retract private rights of action which Congress supposedly understood the courts to have implied from the CEA.[6]

Second, Respondents argue that this Court should ignore the fact that Congress, in enacting the CFTC Act, created expressly a form of private remedy-reparations-for violations of the CEA. Although not denying the availability of reparations to them, Respondents contend that reparations are an inadequate remedy for violations of the CEA. On this ground, Respondents assert that this Court should presume that Congress intended the courts to continue to recognize the private rights of ac-

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[4] Pub.L. No. 93-463, 88 Stat. 1395 (1974).

[5] *Leist* v. *Simplot*, 638 F.2d 283, 303 (2d Cir. 1980), J.A. at 128; *Curran* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216, 232 (6th Cir. 1980); Brief of Respondents Neil Leist, Phillip Smith and Incomco 20-25 ("Leist Br."); Brief of Respondents National Super Spuds, Inc., et. al, 4-9 ("Super Spuds Br."); Brief for the Commodity Futures Trading Commission as Amicus Curiae, 8-16 ("CFTC Br.").

[6] Leist Br. at 20-25; Super Spuds Br. at 4-9 CFTC Br. at 8-16.

tion previously implied from the CEA and to create additional private rights of action based on the CEA,[7] as necessary to assure the availability of adequate remedies.

The reasoning advanced to support this unprecedented approach to implying private rights of action from a federal statute is patently fallacious and would require this Court to ignore the plain meaning of the United States Constitution.

The last decade has been marked by this Court's efforts to deliniate as clearly as possible the respective roles of Congress and the courts. The area of implied rights of action presents perhaps one of the most sensitive of all areas of tension between the legislative and judicial branches of government. In dealing with this area this Court has, with great understanding, fulfilled its constitutional duty of interpreting and not "making" law. Respondents would have the courts discard this limited role and assume the legislature's task until otherwise instructed by Congress. Such a practice, if adopted, would portend the opening of a flood gate of judicial "law making" and impose affirmative duties on Congress to correct court decisions of lower federal courts, even

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[7] Prior to the enactment of the CFTC Act, no court had ever implied a private right of action from section 4a of the CEA, no court had held a futures commission merchant (an "FCM") liable to anyone other than the FCM's customers under Section 4b of the CEA, and the only decision implying a private right of action for damages based on alleged violation of Section 9(b) of the CEA had been reversed by this Court. *See* Brief of Petitioners Heinold Commodities, Inc. and Thomson McKinnon Auchincloss Kohlmeyer Inc., 36-38. Thus, the private rights of action asserted against Clayton in this case are, if they exist, post-CFTC Act rights.

when those decisions are premised on a constitutionally infirm basis. Far more harmful than the sprouting of judicial oaks from legislative acorns,[8] a new species of analysis of legislative intent would be born. Congress will not only be charged with "making" law, it will also be charged with correcting judge made perceptions of law upon the occasion of every amendment to a statute. Such a result is repugnant to a constitution which provides "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."[9]

II.

THE ENACTMENT OF THE COMMODITY FUTURES TRADING COMMISSION ACT DOES NOT PROVIDE A BASIS FOR IMPLYING PRIVATE RIGHTS OF ACTION FROM THE CEA.

The argument advanced in support of now implying private rights of action from the CEA is rooted in scattered excerpts from the voluminous record of the legislative proceedings which lead to the enactment of the CFTC Act. These excerpts are said to demonstrate that when Congress enacted the CFTC Act, it thought that federal courts were implying private rights of action from the CEA.[10] According to Respondents, the

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[8] *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 737 (1975).

[9] U.S. CONST. art. I, §1.

[10] As we have previously pointed out, the courts were not, in fact, implying private rights of action from the CEA. Rather, they were ostensibly applying the common law rule that the violation of a statute enacted to protect a particular class of persons is an actionable tort. Brief of Petitioner, Clayton Brokerage Co. of St. Louis, Inc. 46-47 ("Clayton Br.") Even under the then prevailing

CFTC, and the Majority below, Congress, in 1973-1974 failed to take affirmative action to halt this practice, thereby acquiescing in its continuation after the enactment of the CFTC Act. On this premise it is argued that this Court should recognize the private rights of action pursued by Respondents in order to avoid disrupting the regulatory scheme which Congress ostensibly presumed to be in effect upon enactment of the CFTC Act.[11]

A. Constitutional Principles Preclude Any Reliance on Congress' Perception of Existing Laws When Construing Those Laws.

Congress cannot legislate by inaction. Affirmative federal rights therefore cannot be created and dissolved by the varying perceptions of Congress as to the meaning of statutory provisions enacted by earlier Congresses. Aside from the unreasonable uncertainty which would be created if this were not true,[12] constitutional principles preclude adoption of such a practice.

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[10] (Continued)
practice of liberally recognizing private rights of action on the basis of violations of federal statutes, these decisions were clearly erroneous. *See Wheeldin* v. *Wheeler*, 373 U..S. 643 (1963).

[11] Although the argument is couched in terms of applying cannons of statutory construction — e.g. implied repeals are disfavored; the reenactment of a statute incorporates existing constructions of the statute — the requisite factual bases for applying these cannons of construction are not present in this case. *See* Clayton Br. 42-47.

[12] *See* discussion *infra* at 9-10.

Article I, Section 7 of the Constitution of the United States[13] prescribes the method by which Congress shall enact statutes. Each house of Congress must affirmatively pass a bill before it can become law. Once such bills have become law, it becomes the duty of the courts, not the members of a subsequent Congress, to construe the law. *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803).

While each house of Congress certainly passed the CFTC Act in 1974, no one can identify any provision of that Act which plausibly can be construed to create a private right of action akin to the private rights of action which Respondents seek to have recognized by this Court.[14] None of the statutory language from which the private rights of action asserted by Respondents theoretically derive was enacted as part of the CFTC Act. Thus, no member of Congress who voted on the CFTC Act was called upon to make a judgment, in voting on the bill, whether to enact language which was perceived to create private rights of action for violations of the CEA.

This plainly distinguishes the present case from *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979)

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[13] U.S. CONST. art. I, §7.

[14] The CFTC argues that, in fact, the jurisdictional savings clause contained in Section 201(b) of the CFTC Act can be construed to, in effect, create the private rights of action asserted by Respondents. CFTC Br. at 17-22. The argument is specious. It is a well established principle that jurisdictional provisions do not create substantive rights. *Touche Ross & Co.* v. *Redington*, 422 U.S. 560, 577 (1979). *See also Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, ... U.S. ...., 69 L. Ed. 435, 447-449 (1981) Nor do they authorize the federal courts to formulate or create such rights. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, ... U.S. ...., 68 L. Ed. 2d 500, 509 (1981).

in which this Court's decision was based, in part, on Congress' perception of the law at the time it enacted Title IX of the Education Amendments of 1972. In *Cannon* the decision was grounded on Congress' understanding of the construction which the courts had already given to statutory language similar and, in part, identical to the language which was being enacted by that Congress. *Id.* at 696-99. In this case, even if Congress had, erroneously or otherwise, perceived that when it enacted the CFTC Act the private rights of action here asserted by Respondents were implicitly provided for by the CEA, it clearly did not enact any statutory language which it viewed as creating such rights.

Whether or not Congress, in 1974, would have voted to enact statutory language creating private rights of action to remedy alleged violations of the CEA had such language been included in a bill presented to it for a vote is open to conjecture.[15] None of the bills which had been introduced as proposed versions of the CFTC Act and which contained language creating expressly the types of private remedies pursued by Respondents in these cases were voted on by Congress in 1973-1974. Whether this was due to their sponsors' perception that such bills could not pass, the lobbying efforts of opponents of private rights of action, or simply some accident of the legislative process cannot be known for certain. But the fact remains that no member of Congress in 1973-1974 has had to account to constituents for casting a vote for or against statutory language which would create by implication the private rights of action now pursued by Respondents. This fact, standing alone, pro-

[15] There is substantial evidence suggesting that Congress would not have passed such language. See discussion *infra* at 10-12.

vides a sufficient basis for refusing to imply private rights of action on the basis of the CFTC Act or its legislative history.

B. If the Perceptions of Congress Govern the Construction of a Statute No Private Rights of Action Are Now Implicit in the CEA.

Respondents argue that Congress' failure to take affirmative action to alter what it perceived to be the status quo provides an adequate legal basis for this Court making Congress' supposed perception of the status quo a legal reality. If Congressional inertia resulting from Congress' supposed perception of the law provides an adequate legal basis upon which statutory rights of action may be created, it must logically provide an equally adequate legal basis upon which statutory rights of action may be withdrawn. The mischief of such a rule of law is such that it should preclude adoption by this Court.

The legislative history of the Futures Trading Act of 1978 (the "1978 Amendments")[16] clearly demonstrates that Congress was told, when it amended the CEA in 1978, that federal courts were refusing to imply private rights of action from the CEA. Senator Huddleston, a strong supporter of implied private rights of action, clearly explained this fact to the Senate.[17] While Senator Huddleston was plainly critical of these decisions, his comments made on the floor of the Senate must be regarded as an indication of Congress' perception of the prevailing state of the law, just as surely as Congressman Poage's oft cited remarks,[18] are supposed to demonstrate

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[16] Pub.L. No. 95-405, 92 Stat. 865 (1978).

[17] 124 Cong. Rec.-Senate 10537 (1978).

[18] 119 Cong. Rec.-House 41333 (1973).

Congress' perception of the prevailing state of the law in 1973-1974.[19]

Congress took no affirmative action expressly directed at altering what it (under Respondent's arguments) is deemed to have perceived as the prevailing view of implied private rights of action under the CEA. If the argument advanced by Respondents had any legal merit, whatever implied private rights of action for violation of the CEA had been created in 1974 would have been withdrawn by the enactment of the 1978 amendments, An appellate court must apply the law as it is in effect at the time of its decision. *Cort* v. *Ash*, 422 U.S. 66, 76-77 (1975). When carried to its logical conclusion, therefore, Respondents' own argument concerning the basis for now implying private rights of action from the CEA would compel the reversal of the Court of Appeal's decision.

C. Congress Perceived That Its Creation of The Reparations Proceedings Would Eliminate The Basis For An Implied Private Right of Action Under The CEA.

Even assuming, arguendo, that Congress' perception, in 1974, of the state of the law regarding private rights of action to remedy violations of the CEA has any bearing on this case, that perception certainly does not provide a basis for now implying the private rights of action asserted by Respondents in these cases.

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[19] The Senate Committee on Agriculture and Forestry's report on the 1978 Amendments also indicates that Congress perceived, in 1978, that private rights of action were unavailable to enforce the CEA. The Report twice catalogues the remedies available for violations of the CEA and in each instance makes no reference to private rights of action for violations of the CEA. S. Rep. No. 95-850, 95th Cong., 2d Sess. 12-13, 32 (1978), *reprinted in* (1978) U.S. Code Cong. & Ad. News 2087-2166, 2101, 2120.

While the House Report on the CFTC Act or the testimony before the House and Senate committees considering the CFTC Act might have served to inform Congress that there was a body of opinion, albeit not settled, "that the failure to enforce the exchange rules is a violation of the [CEA] which will support suits by private litigants."[20] This is an insufficient basis to assume that Congress, as a whole, was aware of this body of law.[21] There is equally substantial evidence that Congress was informed that under the prevailing law applicable to implied rights of action, its enactment of statutory provisions creating expressly private remedies for violations of the CEA would preclude continued implication of additional remedies from the statute. *See Commodity Futures Trading Commission Act, Hearings Before The Senate Committee on Agriculture and Forestry on S. 2485, S. 2578, S. 2837 and H.R. 13113*, 93d Cong., 2d Sess. 737 746 ("1974 Senate Hearings") ("If you do choose to retain any such virtually unprecedented responsibility and burden [reparations proceedings] in this regulatory body, there should be explicit language in the statute that federal and state courts are still open if a complainant prefers to go to trial there.") (Statement of Roy A. Shotland, Professor of Law, Georgetown University Law Center).[22]

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[20] H. R. Rep. No. 93-975, 93rd Cong. 2d Sess. 46 (1974).

[21] *See, SEC* v. *Sloan*, 436 U.S. 103 (1978).

[22] This principle is embodied in this Court's decision in *National Railroad Passenger Corp.* v. *National Railroad Passenger Ass'n*, 414 U.S. 453 (1974), decided before either house of Congress conducted any hearings on any of the proposed versions of the CFTC Act. Even if Congress had not been advised explicitly of this principle, it must be presumed that Congress knew the law. *Cannon* v. *University of Chicago*, 441 U.S. at 696-97.

Despite Congress' charged knowledge that the courts would not imply remedies from a statute which already provided express remedies, it proceeded to amend the CEA, creating the reparations proceedings. Nowhere in the CEA, as amended, is there any language which indicates that Congress did not intend reparations to be the sole method of adjudicating[23] private claims based on alleged violations of the CEA.[24] This construction of the reparations procedures is consistent with the descriptions of reparations in both the House and the Senate.[25] It is thus clear that if Congress' perception of the law in 1974 has any bearing on the issues in this case, it compels the finding that Congress did not perceive that the judicial practice of recognizing private rights of action for violations of the CEA would survive the enactment of the CFTC Act.

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[23] Arbitration of disputes, whether or not relating to alleged violation of the CEA, was, of course, required to be available as well. *See* 7 U.S.C. §§7a(11), 20(b)(10).

[24] Any reliance on Section 2(a)(1) of the CEA to argue the contrary is clearly misplaced. The jurisdictional savings clause included in that section of the CEA serves only to limit the effect of the language of Section 2(a)(1) of the CEA which grants exclusive jurisdiction to the CFTC. *See* Clayton Br. at 36-42.

[25] *See* H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 22, 83 (1974); *1974 Senate Hearings*, 194. *See also, Leist* v. *Simplot*, 638 F. 2d 283, 346, J.A. 229 (Mansfield, J., dissenting).

III.

CONGRESS HAS PRESCRIBED THE MEANS BY WHICH RESPONDENTS MAY SECURE RELIEF FOR ALLEGED VIOLATIONS OF THE CEA.

Respondents, the CFTC, and the *amici curiae* Sunnyside Eggs, Inc. ("Sunnyside") and Samuel Friedman ("Friedman")[26] all argue that this Court should imply private rights of action from the CEA because, in the absence of such rights, the remedies available for violations of the CEA would be inadequate. Not only in this assertion plainly erroneous, it is plainly irrelevant.

A. Reparations Provides A Means By Which Persons Damaged By Violations of the CEA May Recover The Full Amount of Their Damages From the Appropriate Parties.

Without exception, each of the violations of the CEA which are alleged by Respondents,[27] Sunnyside (in *Sunnyside Eggs, Inc. et al.* v. *Barry Urner Publications,* C78-1661A (N.D. Ga.)) and Friedman (in *Friedman* v. *Bache Halsey Stuart Shields, Inc., et al.* No. 80 C 111 (N.D. Ill.)) were committed or aided and abetted by a person registered or required to be registered with the CFTC pursuant to Sections 4d, 4e, 4k or 4m of the CEA, 7 U.S.C. §§ 6d, 6e, 6k, 6m. All claims arising from such violations can now be adjudicated in reparations, and, if the claims are sustained, the claimants are entitled to recover the full amount of the damages proven by them from the respondents.

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[26] Although Mr. Friedman has not filed a brief as *amicus curiae,* in this case, he has filed a brief in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran,* Docket No. 80-203, in which he expands on certain points raised in the Leist Br. filed in these consolidated cases.

[27] Including the Respondents in Docket No. 80-203.

7 U.S.C. §18(e).[28] Given the wide ranging nature of the claims alleged, it is apparent, as we have previously pointed out, that violations of the CEA cannot, as a practical matter, occur without the involvement of at least one person registered or required to be registered under the Act.[29] Thus, any concern that the victims of violations of the CEA might be without an opportunity to recover the losses sustained as a consequence of such violations is unfounded.

The concern expressed by Respondents and the Majority in the Court of Appeals that persons such as Messrs. Simplot and Taggares, are immune from monetary liability for the damages caused by their violations of the CEA is also unfounded.

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[28] The Currans, Respondents in Docket No. 80-203, assert that reparations are unavailable to them because the violations for which they seek recovery occurred prior to the enactment of the CFTC Act. If this is true, these violations also occurred prior to the repeal of the state law savings clause in section 4c of the CEA, 7 U.S.C. §6c (1970) (amended 1974), an the concommitant preemption of state law. Thus, the Currans could have availed themselves of any state law remedy which was available, e.g., suit based on common law fraud, breach of fiduciary duty, or the like. If reparations are indeed unavailable to them, their case would be an appropriate case for the court to decline to apply the law in effect at the time of its decision, and, instead, apply the law—in this case state law—in effect at the time of the alleged wrongdoing. *Cort* v. *Ash*, 422 U.S. 66, 76-77 (1975). Their case is no different from that of any other person allegedly injured by violations of the CEA occurring prior to the enactment of the CFTC Act. The fact that Congress chose not to make reparations available on a retroactive basis, while making the Currans' remedy somewhat different from that available now, does not mean that Currans are wholly without a remedy.

[29] Clayton Br. 21, n. 19.

Although the reparations proceedings are available only for violations of the CEA which involve a person registered or required to be registered with the CFTC, Section 14 of the CEA[30] does not, in terms, limit the possible respondents in such a proceeding to persons who are registered or required to be registered with the CFTC under the CEA. Section 13(a) of the CEA[31] provides that:

> *Any person* who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this Act, or any of the rules, regulations or orders issued pursuant to this Act, or who acts in combination or concert with any other person in any such violation, *or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another* would be a violation of the provisions of this Act or any of such rules, regulations, or orders *may be held responsible in administrative proceedings under this Act for such violation as a principal.* (emphasis added)

Reparations are clearly "administrative proceedings under this Act." Thus, Section 13(a) of the CEA clearly permits the joinder of unregistered persons as respondents in a reparations proceeding.

Plainly, reparations afford Respondents with an opportunity for complete relief for violations of the CEA. Thus, even if this Court were to disregard the constitutional principles which compel the mode of analysis now utilized to determine the availability of an implied private right of action and invoke the principle of *ubi jus, ibi remedium*, no private right of action would

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[30] 7 U.S.C. §18.

[31] 7 U.S.C. §13c.

be implied from the CEA under the circumstances of these cases, since the statute, as amended in 1974, expressly provides a remedy—reparations.

The procedural shortcomings of reparations which the Leist Respondents and Friedman contend are indicative of the inadequacy of the relief available in reparations are not unique to reparations. Just as a commodities trader may find himself litigating an alleged CEA claim in reparations while defending in state court against a suit brought by his futures commission merchant to recover a deficit in his account, a securities trader sued in state court by his broker may be forced to litigate his claims against his broker in another forum. The securities trader, for example, can only pursue a claim based on an alleged violation of the Securities Exchange Act of 1934, 15 U.S.C. §78a et seq, in federal court. 15 U.S.C. §78aa. Unless the broker's suit is removable to federal court on the grounds of diversity jurisdiction, the securities trader must litigate his claim in federal court while defending the other suit in state court.[11] There is a substantial likelihood that these proceedings, like a reparations proceeding and a futures commission merchant's suit on a customer's deficit, will proceed at different rates of speed.

Likewise, the possibility that a given claimant may not, under all circumstances, be able to pursue all of his claims against a particular defendant or group of defendants in a single forum, while perhaps inconvenient, is not unusual. Whenever a court invokes the doctrine of primary jurisdiction as to some, but not all of the

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[11] *Cf. Rath Packing Co.* v. *Becker*, 530 F.2d 1295 (9th Cir.) *aff'd*, 430 U.S. 519 (1975) (holding a counterclaim to be an inadequate grounds for removal.)

claims asserted in a given case, it effectively compels litigation of the claims in separate forums. *See e.g. Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289 (1973) (directing court to defer to the Commodity Exchange Commission insofar as the case involved alleged violations of the CEA, but permitting the court to adjudicate the antitrust claims asserted.)

B. It Is The Task of Congress, Not The Task of the Court, To Define The Remedies For Conduct Deemed Wrongful Under Congressionally Enacted Statutes.

Whether or not the statutorily specified remedies for violation of the CEA are adequate or inadequate is irrelevant to the decision in this case. Even the possibility that some alleged violators of the CEA may escape liability to the victims of the violations for their wrongdoing is not a sufficient reason for this court to imply a private right of action from the CEA. *See Texas Industries, Inc.* v. *Radcliff Materials, Inc.,* ..... U.S. ....., 68 L.Ed.2d 500, 507, 509; *Northwest Airlines, Inc.* v. *Transport Workers Union of America, AFL-CIO,* ..... U.S. ....., 67 L.Ed.2d 750, 765-66 (1981). As this Court has often pointed out:

> In our constitutional system the commitment to the separation of powers is too fundamental for us to preempt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches. TVA v. Hill, 437 U.S. 153, 194 (1978).

See also Texas Industries, Inc. v. *Radcliff Materials, Inc.,*

IV.

NO PRIVATE RIGHT OF ACTION TO RECOVER DAMAGES FOR A VIOLATION OF THE CEA HAS EVER EXISTED.

In the final analysis, all of the arguments advanced in this Court in support of now implying private rights of action from the CEA depend on the existence of private rights of action under the CEA prior to 1974. No one seriously contends, however, that any act of any Congress prior to the Congress of 1973-1974 explicitly or implicitly created any private right of action to recover damages for a violation of the CEA. In the absence of such an act of Congress, no such private right of action came into existence.

No decision or line of decisions rendered by the federal courts, not even a decision by this Court, could create such private rights of action. That task is left to Congress. Thus, the rendition of decisions upholding the availability of private rights of actions to recover damages for violations of the CEA exceeds the authority of the federal courts and usurps the prerogative of the legislative branch. The unconstitutionality of this practice is clear, and its abandonment compelled. *Erie R.* v. *Tompkins*, 304 U.S. 64, 77-78 (1938).

CONCLUSION

For the foregoing reasons, Petitioner Clayton Brokerage Co. of St. Louis, Inc. respectfully requests that this Court vacate the Judgment of the Court of Appeals and reinstate the Judgment of the District Court.

Respectfully submitted,

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(consolidated with No. 80-757)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

v.

NEIL LEIST, PHILIP SMITH, AND INCOMCO,
Respondents.

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC.,
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v.

NATIONAL SUPER SPUDS, INC., *et al.*,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF FUTURES INDUSTRY ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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Nos. 80-895 and 80-936
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ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF FUTURES INDUSTRY ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

FUTURES INDUSTRY ASSOCIATION, INC. ("FIA"), respectfully moves pursuant to Rule 36 of the Rules of the Su-

preme Court of the United States for leave to file the accompanying brief *amicus curiae* in support of petitioners Clayton Brokerage Co. of St. Louis, Inc., Heinold Commodities, Inc. and Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc. A writ of certiorari to the United States Court of Appeals for the Second Circuit was granted on February 23, 1981, as was FIA's motion for leave to file a brief *amicus curiae* in support of the petition for that writ.

While petitioners have agreed to FIA's appearance as *amicus curiae,* respondents once again have refused to give their consent. Therefore, we must proceed by this motion.

Petitioners and FIA contend that the court of appeals erred in implying a private right of action for monetary damages against futures commission merchants ("FCMs") under the Commodity Exchange Act (the "Act"), 7 U.S.C. §§ 1-24 (1976 & Supp. II 1978). This holding is contrary to the decisions of this Court, the language and structure of the statute, and the legislative history of the Act.

FIA is a not-for-profit corporation whose 171 members and associate members are FCMs, commercial users of futures markets, and others interested in futures trading, including major banks. FIA and its members are active in the trillion dollar futures industry. In 1980 there were over 92.1 million commodity futures contracts traded on United States contract markets.* FIA estimates that its FCM members effect more than eighty percent of the trades executed on behalf of members of the public.

The purposes of FIA are to act as a spokesman on behalf of the futures industry; to increase public knowledge

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* A contract market is an exchange designated by the Commodity Futures Trading Commission to maintain a market for trading futures contracts. *See* Act § 4, 7 U.S.C. § 6 (1976).

of the economic purposes of futures trading; to encourage public use of the futures markets; to maintain high ethical standards in the futures industry; to assemble, preserve, and furnish to its members, exchanges, and the public accurate and reliable information and statistical data regarding futures trading; and, in general, to facilitate the exchange of ideas with contract markets, members of FIA, and the federal and state governments in order to promote and preserve free futures markets for the benefit of persons who trade futures contracts and the public.

The Second Circuit's decision, if permitted to stand, will have enormous implications for FIA's members. It will leave FCMs subject to conflicting interpretations of the Act by the Commodity Futures Trading Commission and federal courts and expose them to the burden of defending their actions in overlapping, redundant proceedings. This will fragment the uniform regulatory scheme created by Congress to govern the complex, national futures markets and disturb the comprehensive web of enforcement mechanisms created to ensure the Act's effectiveness.

While petitioners in this case have filed detailed, persuasive briefs in support of their position, FIA believes that a number of questions of statutory construction, legislative history, and the case law of this Court require amplification.

Specifically, these questions include the structure and language of the Act, certain aspects of the legislative history, the significance of Congress' creation of a reparations proceeding, and the significance of Congress' express recognition in 1978 of state parens patriae proceedings. FIA believes that these factors are persuasive in determining whether to reverse the decision of the Second Circuit.

THEREFORE, FIA respectfully requests leave of this Court to file the accompanying brief *amicus curiae* in support of the petitioners.

Respectfully submitted,

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ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF FUTURES INDUSTRY ASSOCIATION, INC., IN SUPPORT OF THE PETITIONERS

This brief is submitted on behalf of Futures Industry Association, Inc., ("FIA") as *amicus curiae* in support of the petitioners Clayton Brokerage Co. of St. Louis, Inc., Heinold Commodities, Inc., and Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc.

Statement of Interest

FIA is a not-for-profit corporation whose 171 members and associate members are futures commission merchants ("FCMs"), commercial users of futures markets, and others interested in futures trading, including major banks. FIA estimates that its FCM members effect more than eighty percent of the commodity futures trading activity on United States contract markets[1] on behalf of members of the public. The decision of the United States Court of Appeals for the Second Circuit leaves FCMs subject to conflicting interpretations of the Commodity Exchange Act ("the Act"), 7 U.S.C. §§ 1-24 (1976 & Supp. II 1978) by the Commodity Futures Trading Commission ("CFTC")[2] and federal courts and imposes on FCMs the burden of defending their actions in overlapping, redundant proceedings.

FIA submits that the Second Circuit's decision conflicts with the decisions of this Court, the language and structure of the Act, and the legislative history of the Act, all of which lead to the conclusion that Congress did not intend to create a private right of action. In reaching this same conclusion, the Fifth Circuit recently wrote,

> After our analysis of the legislative material and decisions of other courts on this question, we might add that in this metaphysical pursuit of prescience the

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[1] A contract market is an exchange designated by the Commodity Futures Trading Commission to maintain a market for trading futures contracts. *See* Act § 4, 7 U.S.C. § 6 (1976).

[2] The CFTC is a governmental body whose role with respect to futures trading is analogous to that of the Securities and Exchange Commission with respect to securities. However, because of the substantial differences between futures trading and securities trading, *see* H.R. Rep. No. 975, 93d Cong., 2d Sess. 71 (1974), the powers of the two commissions, and the regulatory scheme enforced by each, vary greatly.

> mind often snatches at shadows and mirages in its attempt to discern evidence of such congressional design —a singularly inappropriate base upon which to predicate an implied private cause of action.

Rivers v. *Rosenthal & Co.*, 634 F.2d 774, 792 (5th Cir. 1980).

FIA believes that the Second Circuit's decision must be reversed.

Summary of Argument

The Second Circuit failed to properly analyze the question under the paradigm established by this Court's decisions. If the statutory language does not reveal a congressional intent to create a private right of action, then only clear evidence in the legislative history of an intent to create a private right of action will be sufficient. The Second Circuit reversed these presumptions by looking first to the legislative history instead of the language of the statute and by requiring that legislative history to reveal a clear intent not to create a private right of action.

The Act has an elaborate scheme of enforcement mechanisms designed to deter violations of the Act or CFTC rules by FCMs and to provide compensation to persons injured by those violations. Nowhere does Congress mention private rights of action for persons like plaintiffs here, although it does expressly provide for actions against FCMs by others. In addition, Congress has created a reparations proceeding designed to replace private actions in court as the means for vindicating the rights of those wronged by FCMs. This per se precludes a finding that Congress intended a private right to exist unless there is clear, persuasive evidence in the legislative history to the contrary. The majority below could point to no such legislative history, and the history they cite, as well as evidence not men-

tioned in the majority opinion, indicates a clear intent not to create a private right of action against FCMs.

The Act, by its terms, does not confer a right on any particular group, but merely creates duties and obligations. It therefore was not enacted for the benefit of an especial class, and the proponents of a private right of action must therefore sustain the burden of demonstrating through clear legislative history that Congress nevertheless intended to create a private of action. Respondents have not, and cannot, sustain that burden.

ARGUMENT

Introduction

The Second Circuit's decision below failed to follow the analytic paradigm established by this Court for deciding whether a private right of action exists under a statute that does not expressly provide for one. As set forth in *Cort* v. *Ash*, 422 U.S. 66 (1975), the test is:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (emphasis in original) (citations omitted) (quoting *Texas Pacific Railroad Co.* v. *Rigsby*, 241 U.S. 33, 39 (1916) (emphasis added)). Although *Cort* established a four-part test, the holding in *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575-76 (1979), makes it clear that each part of that test is merely a tool for discerning "whether Congress intended to create, either expressly or by implication, a private cause of action." *Id.* at 575.

As the Supreme Court has reiterated on numerous occasions, whether a private right of action exists under any act of Congress is a question of statutory construction. *E.g.*, *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11, 15 (1979). Resolving this question is thus a matter of divining the intent of Congress.[3] This Court has emphasized that the search for that intent must begin with the language of the statute itself.[4] The intent gleaned from that analysis is conclusive on the question unless there is clear evidence in the legislative history that the intent of Congress was different from that evident on the face of the statute.[5]

Thus, if the statute by its terms does not create a private right of action, and if analysis of the statutory language does not reveal an intent to create one by implication, then only clear legislative history revealing such an intent will be sufficient. *See Rivers* v. *Rosenthal & Co.*, 634 F.2d 774, 792 (5th Cir. 1980).

The Second Circuit reversed the presumptions by inverting the analysis. It first looked to legislative history and demanded that this history reveal a clear intent *not*

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[3] *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575-76 (1976).

[4] *Cannon* v. *University of Chicago*, 441 U.S. 677, 689-90 (1979).

[5] *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11, 20 (1979).

to create a private right of action even though the statutory language by its terms did not indicate any intent to do so.

The Second Circuit justified this sleight of hand on the basis of seven years of lower court recognition of a private right of action under the Act.[6] The court proceeded on the assumption that unless Congress indicated a clear intent to reverse those decisions, it should be presumed to have acquiesced in them. *Leist* v. *Simplot*, Nos. 7402, 7403, 7404, slip op. at 4062 (July 8, 1980).[7] There is simply no basis in this Court's decisions for a reversal of the presumptions on this ground. While the decision in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), recognized that the existence of case law implying a private right of action can be relevant when examining legislative history, *id.* at 702-03, the Court considered it merely one factor in determining whether Congress intended to create a private right of action, *id.* at 703. The burden switched in *Cannon* only because the especial class requirement was satisfied, not because there was existing case law recognizing a cause of action when the statute was passed. *Id.* at 694.

Finding no clear intent to reject a private right of action, the Second Circuit concluded that such a right exists under the Act. On the contrary, Congress *has* spoken clearly on the question and has rejected a private right of action against FCMs under the Act.

Thus, the Second Circuit erred first in demanding that Congress speak where it had no duty to do so, and, second,

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[6] The first case to recognize a private right of action under the Commodity Exchange Act was *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440 (N.D. Ill. 1967).

[7] The case is reported unofficially at 2 Comm. Fut. L. Rep. (CCH) ¶ 12,051.

in not hearing the voice of Congress clearly rejecting such a private right of action.[8]

I.

There Is No Evidence of Congressional Intent to Create a Private Right of Action Against FCMs.

By switching the burden to the opponents of a private right of action, the Second Circuit avoided the difficult questions posed by the absence of any indication, either in the statute itself or in the legislative history, that a private right of action against FCMs exists under the Act. The difficulty is made more acute by the wealth of evidence indicating that Congress did not intend a private right of action to exist against FCMs on behalf of the plaintiffs in this case.

First, when Congress completely reorganized the Act's enforcement provisions, it failed to include a private right of action on behalf of plaintiffs at the same time it expressly created three mechanisms by which plaintiffs could receive compensation for any damages caused by FCMs who may have violated the Act.[9] Second, even though

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[8] This Court has expressly rejected the notion that a court's opinion about the wisdom of creating a private right of action can be a consideration in deciding whether to do so. Instead, "what must ultimately be determined is whether Congress intended to create the private remedy asserted." *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11, 15-16 (1979). *Compare* Friendly, "In Praise of Erie—and of the New Federal Common Law," 39 *N.Y.U. L. Rev.* 383, 405, 419 (1964).

[9] An injured party with a claim of $15,000 or less can elect to seek relief through the informal arbitration procedures each contract market is required to maintain, Act § 5a(11), 7 U.S.C. § 7a (11) (1976); 17 C.F.R. § 180.5 (1980) (contract markets may maintain such procedures for claims in excess of $15,000), and through CFTC reparations procedures, Act § 14, 7 U.S.C. § 18 (1976 & Supp. II 1978). In addition, section 17 of the Act, 7 U.S.C.

Congress explicitly created two rights of action against FCMs—one on behalf of the CFTC and the other on behalf of the states as parens patriae—Congress failed to create a right of action on behalf of the plaintiffs in this case. *See* discussion at pp. 13-14, 16-17 *infra*. Third, implying a private right of action on behalf of plaintiffs would destroy the comprehensive uniform structure Congress created to regulate the commodities industry. *See* discussion at p. 11-12, 14, 17-18 *infra*.

There is therefore not merely an absence of the affirmative congressional intent required before a private right of action can be implied,[10] but there is clear evidence of an intent not to create such a right.

A. *The Language of the Statute Does Not Support the Implication of a Private Right of Action Against FCMs.*

The Act has an elaborate scheme of enforcement mechanisms designed to deter violations of the Act or CFTC rules by FCMs and to provide compensation to persons injured by those violations. Nowhere does Congress mention private rights of action for plaintiffs, although it does expressly provide for actions against FCMs by others. This per se precludes a finding that Congress intended such a right to exist unless there is clear, persuasive evidence in the legislative history to the contrary. *See Trans-*

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§ 21 (1976 & Supp. II 1978), authorizes the creation, with CFTC approval, of registered futures associations. To obtain approval, these associations are required to establish a mechanism for settling customer claims and grievances against the association's members and employes. *Id.* § 17(b)(10), 7 U.S.C. § 21(b)(10) (1976 & Supp. II 1978). An application is currently pending before the CFTC for a national futures association.

[10] This requirement grows in part from constitutional limitations on the ability of the judiciary to legislate. *See Cannon* v. *University of Chicago*, 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

america Mortgage Advisors, Inc. (TAMA) v. *Lewis*, 444 U.S. 11, 20 (1979).

1. Reparations Proceedings.

In 1974 Congress created a mechanism to enable private individuals to seek compensation for damages resulting from violations of the Act. Section 14 of the Act, 7 U.S.C. § 18 (1976 & Supp. II 1978), provides that anyone injured by an FCM who violates the Act can petition the CFTC to institute reparations proceedings. The CFTC is empowered to award damages through those proceedings to the injured party.

Consistent with the Act's intent to make the CFTC the primary interpreter of the Act in order to ensure uniformity of regulation, the CFTC must make an initial determination whether the facts presented in the petition warrant instituting a reparations proceeding, opening an investigation into the charges, or dismissing the complaint.[11] If the CFTC considers it appropriate, formal reparations proceedings are commenced before an administrative law judge. *See* 17 C.F.R. § 12.31 (1980). As in a court proceeding, although with some minor differences, parties may make motions, *id.* § 12.46, and engage in discovery, *id.* § 12.62. If the claim exceeds $5,000.00, a hearing is held on the record, *id.* § 12.71, and objections can be made to evidence as unreliable, irrelevant, or unduly repetitious, *id.* § 12.80. Appeals from the administrative law judge's determinations are to the CFTC, and from there to the circuit

[11] The dismissal is analogous to a federal district court judge's dismissal of a complaint. The CFTC's dismissal of the complaint and its refusal to refer the action to an administrative law judge is appealable to a circuit court of appeals. *See* Act §§ 14(g) & 6b, 7 U.S.C. §§ 18(g) & 9 (1976); Administrative Procedure Act §§ 10(e), 10(b)(2), 2(a)(6), 5 U.S.C. §§ 704, 701(b)(2), 551(6) (1976).

court of appeals. *See* Act § 14(g), 7 U.S.C. § 18(g) (1976 & Supp. II 1978). If the award goes unpaid, it can be filed in federal district court for enforcement. The award is not open to attack in the district court enforcement proceeding. *See id.* § 14(f), 7 U.S.C. § 18(f). The CFTC reparations proceeding is thus similar in many respects to a district court proceeding and was intended to serve the same function as a private right of action.[12]

As in *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 420 (1975), Congress has rested the resolution of questions arising under a statutory scheme with an administrative agency, and a private right of action will therefore not be implied. It would be inconsistent for Congress to expressly provide a means by which injured persons can recover damages from FCMs who violate the Act and at the same time intend that parallel relief be available without expressly providing for it. Moreover, Congress created a number of procedural safeguards for a reparations proceeding which would be lost if a parallel, private right of action exists.

The CFTC is required to reach an independent determination about the merits of the claims before serving the complaint on the FCM and referring the case to an administrative law judge. Act § 14(a), 7 U.S.C. § 18(a) (1976 & Supp II 1978). If the facts as presented in the complaint are inconclusive or do not provide a sufficient basis for pro-

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[12] In his testimony before the House subcommittee considering the CFTC's reauthorization, CFTC Vice Chairman Rainbolt referred to these proceedings as a private right of action. *Extend Commodity Exchange Act: Hearings on H.R. 10285 Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture*, 95th Cong., 2d Sess. 64 (1978). The existence of this express remedy further distinguishes the securities law precedents so heavily relied on by the majority below. *See Leist*, slip op. at 4047-50.

ceeding with a reparations hearing, the CFTC is empowered to undertake its own preliminary investigation into the charge. *Id.* § 14(b), 7 U.S.C. § 18(b). This shields FCMs from the expense and inconvenience of defending frivolous suits. Similar protections are lacking for FCMs subject to suit in court under a private right of action.

The Act directs the losing party to pay attorneys' fees and other costs if the prevailing party must enforce the award in district court, *id.* § 14(f), 7 U.S.C. § 18(f), or successfully defend an appeal from the CFTC's decision to the circuit courts, *id.* § 14(g), 7 U.S.C. § 18(g). No similar authorization is made for private rights of action in district court and those costs could not be awarded. *See Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975).

No appeal from a reparations award can be taken unless the appellant "also files with the clerk of the court a bond in double the amount of the reparation award against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail." Act § 14(g), 7 U.S.C. § 18(g) (1976 & Supp. II 1978). An appeal from a court decision under an implied private right of action would not be subject to any similar requirement. *See* Fed. R. App. P. 7 (appellant must post bond of $250 to cover costs on appeal).

Implying a private right of action would also be inconsistent with Congress' charge to the CFTC to create a uniform, consistent body of law regulating the futures industry. The reparations proceeding provides a central forum for awarding damages to those injured by FCMs who violate the Act.[13] Thus, the CFTC alone decides if the Act has

[13] CFTC Chairman Bagley cited this as a primary reason for retaining the reparations proceedings under the auspices of the

been violated and is in a position to develop a body of consistent decisions interpreting the relevant provisions of the Act.[14] Recognition of a private right of action against FCMs would not only create conflicts in the decisions interpreting the Act, but would also subject them to suit in over one hundred district courts across the country.

2. Suits by CFTC and State Officials.

The right to bring suit is expressly given to the CFTC and to the states as parens patriae for their citizens. Section 6c, 7 U.S.C. § 13a-1 (1976), authorizes the CFTC to sue FCMs and others for an injunction restraining illegal practices or compelling compliance with affirmative obligations imposed by the Act. Section 6d, 7 U.S.C. § 13a-2 (Supp. II 1978), allows state officials to sue for injunctive relief or monetary damages when any person (other than floor brokers, clearinghouses, and contract markets) are violating or have violated the Act. Congess thus expressly granted certain parties the right to bring suit against FCMs. The absence of any mention of that right for others necessarily means that they do not possess that right. *Transamerica Mortgage Advisors*, 444 U.S. at 19-20.

This Court's decision in *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974) (*Amtrak*)—decided two weeks before the House hearings began, four months before the Senate hearings began, and eight months before the conference report

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CFTC instead of transferring them to a futures association. *Extend Commodity Exchange Act: Hearings on H.R. 10285 Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture*, 95th Cong., 2d Sess. 632 (1978).

[14] Judicial review is limited to whether the CFTC's determinations are supported by the weight of the evidence, *see Act* § 14(g), 7 U.S.C. § 18(g) (1976 & Supp. II 1978).

was issued—made it clear to Congress that the creation of certain remedies necessarily implies the exclusion of those not mentioned.[15] In finding that no private right of action existed under section 307(a) of the Rail Passenger Service Act of 1970, this Court held that

> [s]ince the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, [the] maxim [*expressio unis est exclusio alterius*] would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act.

Id. at 458. Therefore, Congress' failure to mention a private right of action against FCMs in the elaborate enforcement scheme it created to ensure that FCMs complied with the Act and to provide adequate compensation for the victims of illegal practices is not silence revealing nothing, but an affirmative indication that it did not intend such a right to exist.

Moreover, as in *Amtrak*, the scope of the rights of action expressly created are carefully circumscribed. The CFTC is prohibited, for example, from proceeding ex parte. Act § 6c, 7 U.S.C. § 13a-1 (1976). State officials cannot sue contract markets, clearinghouses, or floor brokers, *id.* § 6d(1), 7 U.S.C. § 13a-2(1) (Supp. II 1978); they must notify the CFTC of the suit; and the CFTC has the right to intervene in the action and to petition for appeal, *id.*

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[15] The attempt of the majority below to belittle this fact on the ground that "*Amtrak* was decided when the amendments were well on the road to enactment," *Leist*, slip op. at 4091, is thus unpersuasive. The case was decided on January 9, 1974; the House hearings began on January 23, 1974; the Senate hearings began on May 13, 1974; and the conference report was issued in September 1974.

§ 6d(3), 7 U.S.C. § 13a-2(3). It would be incongruous for Congress to carefully limit the rights of action it expressly creates and to intend that another, unstated right of action exist with no restrictions at all. *See Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 736 (1975).

The limitations imposed on state parens patriae proceedings illustrates the special nature of the CFTC's exclusive jurisdiction. Its exclusive jurisdiction is based on a need for a national uniform regulatory system governing the commodities industry. *See Rivers* v. *Rosenthal*, 634 F.2d 774, 779-80 (5th Cir. 1980). To protect that uniformity, the CFTC must be given notice of any proceedings brought by the states under its parens partriae powers to enforce the Act, and it has the right to intervene and to prosecute appeals. This ensures the CFTC's involvement in all interpretations of the Act.

The provision in section 6d(7), 7 U.S.C. § 13a-2(7) (Supp. II 1978), that the creation of a parens patriae proceeding is not intended to prevent state officials from enforcing their *general* civil or criminal fraud statutes in state court is not inconsistent with these restrictions. If suit is brought solely under such statutes, a court will not be required to interpret the Act and there is no possibility of inconsistent interpretations. Accordingly, the CFTC does not have the same interest it has when a state proceeds under its parens patriae authority.

B. *The Legislative History of the Act Does Not Support the Implication of a Private Right of Action Against FCMs.*

The legislative history reveals an intent on the part of Congress to preclude a private right of action against FCMs under the Act.[16] The 1974 amendments completely

[16] Petitioners and nine United States Commodity Exchanges, as *amici curiae*, have addressed the legislative history of the Act prior

reformed the regulatory system governing the commodity futures industry. The amendments were the result of general dissatisfaction both with the scope and the effectiveness of federal regulation. *See* H.R. Rep. No. 975, 93d Cong., 2d Sess. 36-48 (1974). Thus, the two principal changes made by the amendments were to extend federal regulation to cover all commodity trading and to extend federal enforcement by establishing an independent, full-time agency with broad enforcement powers. As part of the effort to expand federal regulatory control, Congress completely revised the enforcement mechanisms available to the CFTC and to private individuals. In so doing, it chose not to create a private right of action for individuals injured by violations of the Act. Instead, it required the exchanges to establish informal arbitration procedures, Act § 5a(11), 7 U.S.C. § 7a(11) (1976 & Supp. II 1978), and estabished a formal reparations proceeding under the auspices of the new CFTC to award compensation to those injured by violations of the Act, *id.* § 14, 7 U.S.C. § 18. Nowhere in the discussion of available remedies is there any mention of a private right of action against FCMs on behalf of the plaintiffs in this case.

The Second Circuit considered this irrelevant because it found evidence that Congress was aware of judicial decisions recognizing a private right of action, and found no legislative intent to reject those decisions. *Leist*, slip op. at 4062. But that argument only goes so far. While it possibly can be said to explain the omission of any mention of the remedy from the Act itself, it fails to explain the omission of any reference to a private right of action in the exhaustive discussions of the available enforcement

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to the 1974 amendments. Accordingly, we do not burden the Court with a repetition of it. Instead, we address the 1974 amendments which also support the conclusion that Congress did not intend to create a private right of action against FCMs under the Act.

and remedial mechanisms in the committee reports. *See* S. Rep. No. 1131, 93d Cong., 2d Sess. 24-25, 29, 38-39, 40 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 5843, 5865, 5868-70, 5877-78, 5879; H.R. Rep. No. 975, 93d Cong., 2d Sess. 2-4, 14-15, 22, 30-31, 67-68 (1974). In explaining the reparation proceedings, the House Report stated that the procedure is "designed to supplement the informal 'settlement procedures' contemplated of the contract markets and registered futures associations." *Id.* at 22. The Committee conspicuously omitted any mention of private rights of action when it described the forum the reparations proceedings were designed to supplement.

Moreover, the majority in *Leist* relied on isolated statements throughout the legislative history that the purpose of the Act was to strengthen regulation and construed those statements to mean that any existing enforcement mechanisms were to be maintained. However, "[i]t is just as reasonable to infer, . . . that this 'strengthening' of the extant regulatory structure was to be accomplished by the centralization in the federal government of a much-enlarged express enforcement structure, and that the 'strengthening' need not include private actions—especially in light of the reparations procedure." *Rivers*, 634 F.2d at 788 n.27.

As with the 1974 reports, the 1978 Senate report on the reauthorization of the CFTC cataloged the means by which the Act protects customers without even mentioning the existence of a private right of action. S. Rep. No. 850, 95th Cong., 2d Sess. 12-13, 32 (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 2087, 2100-01, 2120.

In 1978, Congress found certain inadequacies in the existing enforcement mechanisms of the Act. On the reasoning of the Second Circuit, Congress should have been aware when it revised the act in 1978 that various courts were holding that the 1974 amendments had abolished any

private right of action.[17] The same thing was happening with parens patriae suits. State securities commissioners believed that the 1974 amendments had also abolished any parens patriae suits. *See, e.g., Extend Commodity Exchange Act: Hearings on H.R. 10285 Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture*, 95th Cong., 2d Sess. 174-75 (1978) (remarks of Conrad Goodkind, Wisconsin Commissioner of Securities). Congress ensured the continued existence of parens patriae suits by expressly granting authority to state officials to bring them within certain carefully circumscribed limits. It took no such action with regard to private rights of action.[18]

Congress apparently considered the judicial denial of private rights of action a salutory development in keeping with the spirit of the 1974 amendments. Otherwise, it would have remedied the situation by expressly providing for a private right of action in the same manner in which it codified the right of state officials to bring parens patriae suits for Act violations.

However, in addition to explicitly providing for parens patriae suits, Congress was careful to ensure that they did not conflict with the CFTC's exclusive jurisdiction and the development of a uniform national regulatory system. S. Rep. No. 850, 95th Cong., 2d Sess. 25-26 (1978), *reprinted*

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[17] *See, e.g., Bartels* v. *International Commodities Corp.*, 435 F. Supp. 865 (D. Conn. 1977); *Consolo* v. *Hornblower & Weeks-Hemphill, Noyes, Inc.*, 436 F. Supp. 447 (N.D. Ohio 1976); *Arkoosh* v. *Dean Witter & Co.*, 415 F. Supp. 535 (D. Neb. 1976).

[18] It is therefore inappropriate to conclude, as the majority below did, that the 1978 amendments are irrelevant because "Congress was concentrating on *parens patriae* suits; it was not considering a general revision of the CEA," *Leist*, slip op. at 4101. While the Act was not totally revised in 1978, Congress did address problems that had arisen in the Act, and specifically in its enforcement mechanisms, since 1974.

in [1978] U.S. Code Cong. & Ad. News 2087, 2113-14. To preserve the exclusive jurisdiction of the CFTC, registered contract markets and floor brokers were made exempt from suit. "Plenary authority to register, regulate, and, discipline the contract markets and the 'locals' whose activities are generally of the character of pit trading rather than customer contact is reserved to the Commission." *Id.* at 25, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 2113. Congress was concerned that a multiplicity of suits would destroy the uniform system of regulation that it hoped to achieve by establishing the CFTC. Therefore,

> [t]o assure that the body of decisional law developed under this section would be coherent and consistent with national policy, new section 6d provides that States, before instituting an action thereunder, must receive the prior approval of the Commission. State prosecutional discretion would, therefore, be checked only to the degree that contemplated State prosecutions deviate from national policy established by the Commission.

Id. at 26, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 2114; *accord, Extend Commodity Exchange Act: Hearings on H.R. 10285 Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture*, 95th Cong., 2d Sess. 617 (1978) (remarks of John V. Rainbolt, II, vice chairman, CFTC).[19]

It is inconceivable that Congress would have taken such precautions with fifty possible plaintiffs, all of whom are public officials, and yet intended a private right of action

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[19] This provision was later amended to require that states notify the CFTC and to allow the CFTC to intervene as of right and to prosecute appeals. As finally passed, the section more directly ensures CFTC participation in the decisionmaking process.

to exist for millions of private citizens with no restrictions on their right to sue or provisions for CFTC intervention.

Thus, even assuming that the burden is on the opponents of a private right of action to demonstrate that Congress did not intend to create a private right of action, the evidence is conclusive that Congress harbored no such intent. A fortiori, no private right of action can be found if the burden is placed on the proponents of such a right as required by the decisions of this Court. *See, e.g., Cannon* v. *University of Chicago,* 441 U.S. 677, 694 (1979). Moreover, the absence of an especial class, as demonstrated below, creates a heavy presumption against implying a private right of action. That presumption can only be rebutted by a clear showing of persuasive evidence to the contrary. The above analysis demonstrates that this evidence is lacking and plaintiffs cannot meet their burden.

As the unanimous panel of the Fifth Circuit sitting in *Rivers* v. *Rosenthal,* 634 F.2d 774 (5th Cir. 1980), found,

> The net result of our study and deliberations in this case is the determination that the language and legislative history of the CEA and CFTCA, dissected by all of the varied and even conflicting canons of construction, simply do not provide any clear indication of congressional intent either to approve or deny an implied right of action. In such a case, as explained in Part II, supra—given the absence of clear evidence of the requisite affirmative congressional intent to create or provide such a cause of action—we are bound to refuse plaintiffs' suit.

Id. at 792.

II.

The Commodity Exchange Act Was Not Enacted for the Benefit of Any Especial Class.

This Court has repeatedly emphasized that in deciding whether Congress intended to create a private right of action, a primary criteria is whether the statute was enacted for the benefit of an especial class.[20] The Second Circuit, however, failed to deal with the criteria established by the decisions of this Court for determining whether the plaintiffs before it were part of an especial class for whose benefit the Act was enacted.

A. *The Statute Merely Imposes Duties, It Does Not Confer Rights.*

Statutes enacted for the benefit of the general public have been uniformly held not to support the implication of a private right of action.[21] *See, e.g., Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 569-70 (1979); *Cort* v. *Ash*, 442 U.S. 66, 80-82 (1975); *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464, 469 (1959). In deciding whether the statute was enacted for the benefit of an especial class or the public at large, this Court has looked to whether the statutory

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[20] *E.g., Cannon* v. *University of Chicago*, 441 U.S. 677, 689-90 & n.13 (1979).

[21] While a number of decisions construing the securities laws are an exception to this rule, *e.g., J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971), they do not support plaintiff's argument in the case at bar for two reasons: First, their approach has been severely questioned by this Court and their precedential value limited. *See Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11, 15-16 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677, 690 n.13 (1979). Second, the statutory language of the securities laws itself provides a basis for implying such a right. *See* Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1976).

language confers a right on a specific group or imposes duties on certain persons. The creation of duties and obligations, even if for the primary benefit of one group, is insufficient to sustain a finding that a private right of action exists. *See Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 421 (1975). The Commodity Exchange Act is similar to the act at issue in *Barbour* in that while certain groups can be identified as the primary beneficiaries of the act, the statute creates no rights but merely imposes duties and obligations for their benefit and the benefit of the general public.

A determination that a statute confers a right on an especial class will be based almost exclusively on the statutory language itself. Thus, the Supreme Court in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), based its conclusion that Title IX was enacted for the benefit of an especial class on Congress' specific choice of language. The statute provides in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance." Education Amendments of 1977, Title IX, § 901(a), 20 U.S.C. § 1681 (1976). The Court found dispositive this specific identification of the benefited class and the express conveyance of a right on that class by the statutory language itself. 441 U.S. at 690-91. The Court stated,

> [T]here would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disburse-

ment of public funds to educational institutions engaged in discriminatory practices.

Id. at 690-93. The Court distinguished the alternative language considered by Congress from the language of the statute actually passed. As originally proposed, the statute only prohibited the Secretary of Health, Education, and Welfare from making any "grant, loan guarantee, or interest subsidy payment" to any institute of higher education that discriminated on the basis of sex. *See id.* at 693 n.14. The Court indicated that this mere intent to benefit a particular class without the conveyance of a right on that class would have been insufficient.[22]

The Second Circuit not only failed to correctly analyze the relevant statutory language against this criteria, it failed to address the issue at all. If it had, it would have recognized that the Act is written solely in terms of duties and obligations; nowhere does it confer a right on any group.

Plaintiffs here seek to find an implied cause of action against FCMs under sections 4a, 4b, and 9(b) of the Act, 7 U.S.C. §§ 6a, 6b & 13(b) (1976).[23] Sections 4a and 4b, like the original proposed language of the statute discussed in *Cannon*, make unlawful (*i.e.*, prohibit) certain conduct and do not create rights in any private person. Section 4a prohibits any person from exceeding CFTC established position limits. Section 4b prohibits FCMs and other con-

[22] The Fifth Circuit recently relied on this distinction in refusing to imply a private right of action on behalf of workers paid less than the minimum wage by government contractors in violation of the Davis-Bacon Act, 40 U.S.C. § 276(a). *United States* v. *Capeletti Brothers, Inc.*, 621 F.2d 1309, 1314 (5th Cir. 1980).

[23] While the complaint fails to specify which sections of the Act defendants allegedly violated, we assume, as did the court below, that plaintiff relies on sections 4a, 4b, and 9(b) of the Act, 7 U.S.C. §§ 6a, 6b & 9(b) (1976).

tract market participants from, *inter alia*, cheating or defrauding certain other persons in connection with a futures transaction.[24] Section 9(b) imposes criminal sanctions on those who violate certain other sections of the Act.[25] Even assuming that the purpose of these sections is to protect those trading in the market, that does not make all traders an especial class for whose benefit the Act was passed.

As this Court held in *Touche Ross & Co.*, *Cannon*, and *Barbour*, it is insufficient to find that an act was passed to protect investors. The statute must expressly confer a right. The act in question here does not do so; like the original draft of Title IX, it merely imposes a duty on those engaged in the sale of commodities futures.

A finding that a statute was not enacted for the benefit of an especial class creates a heavy burden on the proponent of a private right of action to demonstrate through legislative history that Congress *clearly* intended such a right to exist. *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11, 20 (1980). The Second Circuit failed even to engage in this analysis. The evidence, as marshalled by Judge Friendly writing for the majority below, does not meet this burden.

Judge Friendly relies on the absence of any clear intent to preclude a private right of action and random, isolated statements by various Congressmen indicating an aware-

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[24] Whatever the resemblance of section 4b of the Act to the antifraud provisions of the Securities Exchange Act, the Supreme Court has made it clear that its finding of an implied private right of action under section 10(b) of the Securities Exchange Act (15 U.S.C. § 78j(b) (1976)) has no such precedential value. It has, for example, refused to imply a private cause of action under a similarly worded provision in the Investment Advisors Act. *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11, 19-24 (1979).

[25] Criminal statutes are generally enacted for the benefit of the public as a whole, not an especial class. *See Cort* v. *Ash*, 422 U.S. 66, 81 (1975).

ness, but never affirmative approval, of existing case law recognizing a private right of action. Judge Friendly cites to two references in the House Report to private rights of action against exchanges, which, the Report notes, were causing the exchanges to reduce their regulations to avoid increased liability, *see Leist*, slip op. at 4072-73 & n.28, and one statement by Congressman Poage and one statement by Congressman Thone, *id.* at 4074-75 & n.29. These Report statements are in the context of an eighty-six page analysis, and the two statements on the floor are in the context of seventy-three pages of congressional debate. None of the statements refer to FCMs and none indicate approval of a private right of action.

Judge Friendly also refers to statements by two different representatives of the various New York commodity exchanges before the House committee in which the spokesmen urged Congress to insulate the exchanges from liability, *id.* at 4076, and a letter from Continental Grain warning of the problems of class action litigation and advocating the establishment of arbitration and agency settlement procedures, *id.* at 4076-77. None of these statements indicate approval of a private right of action, only the Continental Grain letter refers to FCMs, and there are no congressional statements at all on this topic in the hearings. Moreover, these three statements are in the context of 332 pages of hearings.

Judge Friendly also cites three statements in the Senate hearings—two by Professor Schotland and one by Senator Clark—that "expressed the view that private actions were available under the Act." *Id.* at 4077. However, the statement of Senator Clark only advocated the adoption of his own bill that expressly provided for a private right of action. ***Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837, and H.R. 13113 Before the***

Senate Comm. on Agriculture and Forestry, 93d Cong. 2d Sess. 205 (1974). Senator Clark's bill was never adopted. In addition, the two statements by Professor Schotland only expressed approval of Senator Clark's bill and advocated expressly providing for a private right of action. *Id.* at 737, 746. Contrary to the inference drawn by Judge Friendly, Professor Schotland's statements implied that if Congress failed to expressly provide for a private right of action, none might exist given the alternative vehicles for enforcement and compensation provided by the Act. *See id.*

Thus, the references cited by the majority in *Leist* fall short of the clear, persuasive evidence required by the case law of this Court.

B. *Plaintiffs Are at Best Secondary Beneficiaries of the Act.*

Even asuming *arguendo* that section 4a, 4b, and 9(b) of the Act were created for the benefit of an especial class, plaintiffs are certainly not within it. The plaintiffs in the case at bar are speculators, and the Second Circuit went to great lengths to establish that speculators are not the pariahs of futures trading. *Leist*, slip op. at 4063-70. While this is true, it is also irrelevant.

The statutory language and the legislative history both recognize the legitimate role of the speculators in creating market liquidity and in accepting the risks hedgers are unwilling to bear. H.R. Rep. No. 975, 93d Cong., 2d Sess. 138 (1974). To attract speculators to the market, the Act affords them certain protections. *See, e.g.*, Act § 4b, 7 U.S.C. § 6b (1976). But the Supreme Court has held that a private right of action can only be implied in favor of a statute's primary beneficiaries. *See Cort* v. *Ash*, 422 U.S. 66, 81 (1975). It is clear that the Act is intended primarily for the benefit of producers and consumers. For example, section 3 of the Act, 7 U.S.C. § 5 (1976), sets forth the reasons

for the statute and the importance of futures trading for the national economy. After detailing how various parties rely on the price discovery mechanisms of the futures market, the section states,

> The transactions and prices of commodity on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the *producer* or the *consumer* and the *persons handling commodity and products and byproducts thereof* in interstate commerce, and such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodity and the products and byproducts thereof and render regulation imperative for the protection of such commerce and the national public interest therein.

Id. (emphasis added). A similar purpose is evident in section 4a, 7 U.S.C. § 6a (1976), which authorizes the CFTC to set daily trading limits and prohibits any person from exceeding them. It was passed, by its very terms, to protect the market from excessive speculation that distorts market prices to the detriment of those who use the market as a vehicle for hedging and price discovery.

The legislative history of the 1974 amendments supports this interpretation. The 1974 House Report states,

> The major objectives of CEA [Commodity Exchange Authority, predecessor of the CFTC] in the enforcement of the Commodity Exchange Act, are to protect the price and hedging services of the commodity futures markets. These services are widely used by farmers, merchandisers, and processors. To carry out its enforcement objectives, CEA works to maintain

> fair trading practices and competitive pricing on commodity exchanges; and to prevent price manipulation, cheating, fraud, and abusive acts and practices in commodity transactions.

H.R. Rep. No. 975, 93d Cong., 2d Sess. 36 (1974).[26] In fact, the incentive for the 1974 amendments came from hedgers and producers, *id.* at 36, who complained that the existing statutory scheme was insufficient to control the manipulative activity of speculators, which "distorted the traditional relationships between cash and futures prices," *id.* at 48.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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[26] *Accord,* H.R. Rep. No. 975, 93d Cong., 2d Sess. 62, 63, 76, 82 (1974); S. Rep. No. 1131, 93d Cong. 2d Sess. 14, 18, 46 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 5843, 5856, 5859, 5885.